3224 MES-MOR

Office - Supreme Court, U. S.
FILED
MAR 3 1944
CHARLES ELMORE CROPLEY
CLERK

(D)

Supreme Court of the United States

OCTOBER TERM 1943

No. 754

RUFUS MESHBERGER and LELIA B. MESHBERGER,
Petitioners,

vs.

THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY,
Respondent.

PETITION AND BRIEF

For Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

ELMER MCCLAIN,
Lima, Ohio,
SAMUEL E. COOK,
Huntington, Indiana,
Counsel for Petitioners.

U. S. Law Printing Company, 2817 N. Halsted St., Chicago, Ill.

INDEX.

PAGE

PETITION.

I A Summary Statement of the Matter Involved.... 2
The Statute 2
The Issues 2
The Decisions Below 3
A Very Short Statement of the Facts 3

II Statement of the Basis of the Jurisdiction of this Court 4

III The Questions Submitted 4

IV Reasons Relied Upon for the Allowance of the Writ of Certiorari 7

Prayer 15

BRIEF.

I The Opinions Below 12

II Grounds on Which Jurisdiction Is Invoked 12

III Statement of the Case 12
Preliminary History 12
Proceedings under Section 75 (a) to (r) 13
Proceedings under Original Section 75 (s) 13
Proceedings under Present Section 75 (s) 14

Note on the relation of the three appeals in this case Footnote 1 14
The Facts Immediate to the Present Action 15

IV Specification of Errors 17

V Summary of the Argument 19

143939

PAGE

VI Argument 21
Preliminary Consideration 21
1. The Main Issue 21
Respondent's Litigation of the Order As Erroneous 22
A Resume of the Facts on this Point 28
An Examination of the Reasoning of the Courts Below 28
Conflict with the Rules Recognized by this Court 30
Some Practical Considerations 32
If Jurisdiction Had Expired Respondent Restored It 35
2. N. F. L. A. Stock 37
3. Rent Money 39

Conclusion 40

CASES AND AUTHORITIES CITED.

Bronson v. LaCrosse, 68 U. S. (1 Wall.) 405 ..... 8, 30
Bankruptcy Act of 1898 31
Davison v. Prudence, 1941, 312 U. S. 649 ..... 10, 31
Denham v. Munson, 1941, 312 U. S. 650 ..... 10, 31
Federal Land Bank v. Meshberger, 1942, 131 Fed. (2d) 281 3
Endalman v. Prudence, 1941, 312 U. S. 649 ..... 10, 30
Federal Land Bank v. Meshberger, 131 Fed. (2d) 287 14, 15
Federal Land Bank v. Meshberger, 138 Fed. (2d) 954 14, 17
John Hancock v. Bartels, 308 U. S. 180 ..... 14, 33
Kalb v. Feuerstein, 308 U. S. 133 33
Kelby v. Prudence, 1941, 312 U. S. 649 ..... 10, 31
Knox v. Phillips, 1937, 300 U. S. 194 38
Louisville v. Radford, 1935, 295 U. S. 555 14
Montgomery Ward & Co. v. Duncan, 311 U. S. 243 11

PAGE

Manufacturers v. Prudence, 1941, 312 U. S. 649 .....10, 30

Meshberger v. Federal Land Bank, C. C. A. 7, 1943 Fed (2d) 954 3-12

Prudence v. Prudence, 1941, 312 U. S. 649 .....10, 31

Reconstruction v. Prudence, 1941, 311 U. S. 579 ....10, 14, 30

Rorick v. Commissioners, 307 U. S. 208, 213 11

Rule 73 (a) Federal Rules of Civil Procedure and General Order 36 31

Sec. 24 (h) and 250 Bankruptcy Act, 11 U. S. C. 47 (b) and 650 31

Sec. 240 (a) Judicial Code; 28 U. S. C. 347 (a) 4

Sec. 8(a) Act of February 13, 1925; 28 U. S. C. 350 4

Sec. 75 Bankruptcy Act, 11 U. S. C. 203 7

6 Cyclopedia of Federal Procedure, p. 341 30

Toland v. Sprague, 37 U. S. (12 Peters) 300, 93 A. L. R. 1302 36

Watts v. Unione Austriaca, 248 U. S. 9, 21 11

Wright v. Vinton, 300 U. S. 440 14

Wright v. Logan, 315 U. S. 139 17

Wright v. Union Central, 311 U. S. 273 .....33, 38, 40

Wright v. Union Central Life Ins. Co., 304 U. S. 502 33

12 American and English Encyclopedia of Law, p. 299 36

Supreme Court of the United States

OCTOBER TERM 1943

NO.

RUFUS MESHBERGER and LELIA B. MESHBERGER,
Petitioners,

vs.

THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY,
Respondent.

PETITION

For a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

(The brief in support of this petition begins at p. 12.)

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

A Summary Statement of the Matter Involved.

The Statute.

The case arises out of Section 75 of the Bankruptcy Act, 11 USC 203, which relates to proceedings for the rehabilitation of farmer debtors. The portion of the statute which is most particularly involved is Section 75 (s).

The Issues.

The chief question presented is whether a farmer debtor's **right** of redemption is **extinguished** under the following circumstances: A mortgage holder (respondent here) sought and obtained an order in the bankruptcy court fixing the valuation at which the farm was to be redeemed under the statute and setting a time for paying it into court. The mortgage holder then contested the order by appeal claiming it to be erroneous and the time expired before the valuation was finally determined.

There is also presented the question whether a farmer debtor, who is compelled to purchase stock in a subsidiary of the mortgage lender, is entitled to have credit for the par value of his stock when he pays the debt when he redeems his farm from the mortgage, insolvency of the subsidiary not being involved.

Another question presented is whether rent money paid by a farmer debtor and in the hands of the court when the

court fixes the amount of redemption money shall be credited upon the amount of redemption money so fixed.

The Decisions Below.

The decision of the Seventh Circuit Court of Appeals was dated December 2, 1943, and is reported as *Meshberger* v. *Federal Land Bank,* CCA 7, 1943, 138 Fed. (2d) 954. It appears at page 138 of the record.

The opinion of the district court, which is not reported, is found in the record at page 71 and the final order of the district court is at page 74.

A Very Short Statement of the Facts.

The mortgage holder (respondent here) moved the bankruptcy court to enter an order fixing a value of the farmer debtors' farm for redemption and fixing a time for payment into court. Such an order was entered whereupon the respondent who sought the order appealed, assigning as error that the value so fixed should be increased and the time shortened. R. 42, paragraph number 2. Upon appeal the valuation was affirmed. Opinion on that appeal: *Federal Land Bank* v. *Meshberger,* 1942, 131 Fed. (2d) 281, third paragraph from the end. Order on that appeal: R. 129. **That appeal is not the subject of this petition for certiorari** but it bears an important relation to it.

This petition for certiorari grows out of the subsequent procedure now to be narrated. After the valuation of the farm had been finally determined by the appeal just referred to, the farmer debtors requested the bankruptcy court to permit them to redeem at the fixed price and they

also sought credit thereon for stock in a subsidiary of the Federal Land Bank, called the National Farm Loan Association, which they were compelled to pay for by deduction from their original loan, and for rent money then in the possession of the court. R. 59 to 61. R. 66 to 71. The mortgage holder (respondent here) objected (R. 63) to redemption, and also to any credits if redemption be allowed. The request of the farmer debtors was denied, (R. 71), although the entire $6,000 fixed by that court and sustained by the appellate court was available and was later paid into the court in cash (R. 94) before the appeal, which is involved here, was certified to the appellate court. R. 130-131. The appellate court affirmed the bankruptcy court (R. 143) on the ground that because the **time** originally fixed in the bankruptcy court had expired, during the appeal litigation, the **right** to redeem was thereby extinguished. As already stated the expiration occurred during the pendency of the appeal by the mortgage holder (respondent here) from the order sought by it.

Both courts failed to pass upon the petition of the farmer debtors for credits. The petitioners did not deduct any sum from their cash tender because of their claims to credit but paid to the court the full $6,000.

II.

Statement of the Basis of the Jurisdiction of This Court.

The jurisdiction of this court is conferred by Section 240(a) of the Judicial Code; 28 USC 347 (a).

The petitioners have complied with Section 8 (a) of the Act of February 13, 1925; 28 USC 350. The final judgment of the court below which was entered on December 2, 1943

(R. 143), became final on January 3, 1944, when a petition for rehearing was denied. (R. 146). This petition is filed within three months after the original entry of the judgment and of the denial of the petition for rehearing.

III.

The Questions Submitted.

The questions submitted are:

1.

Whether the farmer debtors' right of redemption was extinguished because the bankruptcy court upon the application of the mortgage holder (respondent here) set a price for redemption which the mortgage holder then claimed to be erroneous and contested by appeal, and that appeal was decided subsequent to the time set by the bankruptcy court for payment of the price into court.

2.

Whether the power of the bankruptcy court to permit the farmer debtors to redeem was lost because the mortgage holder (respondent here) sought an order and then claimed it to be erroneous and contested it by appeal and the time set for the redemption expired before the appeal was decided.

3.

Whether by seeking and obtaining an order fixing the amount and time for redemption and then claiming it to be erroneous and appealing therefrom a mortgage holder (respondent here) can object to payment of the amount finally determined by the appeal upon the sole ground that the time had elapsed during the appeal.

4.

Whether the bankruptcy court could deny to the farmer debtors the statutory right to redeem their farm in the amount of money fixed by the order of the court on the mere ground that the time previously set by the court had expired while the mortgage holder (respondent here) was contesting said order by appeal claiming it to be erroneous.

5.

Whether the bankruptcy court could deny to the farmer debtors the statutory right to redeem their farm in the amount fixed by its order on the mere ground that the time previously set by the court had expired while the mortgage holder (respondent here) was contesting said order by appeal claiming it to be erroneous, and thereafter appeared and litigated the petition of the farmer debtors to be given credit upon the amount fixed by the court for stock in the National Farm Loan Association, its subsidiary, and for rent money in the hands of the court.

6.

Whether the bankruptcy Court could deny to the farmer debtors the right to apply, as part payment on the amount so fixed by the court, the par value of stock which they were compelled to purchase in a National Farm Loan Association, a subsidiary of the mortgage holder, the Federal Land Bank (respondent here), through which subsidiary they borrowed the sum secured by the mortgage.

7.

Whether the bankruptcy court could deny to the farmer debtors the right to apply, as part credit on the amount so fixed by the court, the rent money then in the hands of the court.

IV.

Reasons Relied Upon for the Allowance of a Writ of Certiorari.

1.

The decisions below involve a question of great importance in the administration of an act of Congress whose purpose is the rehabilitation of farmer debtors. Section 75 of the Bankruptcy Act. 11 USC 203.

2.

In so far as the decisions below may be defended upon the ground that the date for redemption expired before the price set by the bankruptcy court was paid into court, the delay was wholly due to the mortgage holder (respondent here), who sought an order fixing the price and then contested it claiming it to be erroneous, by its appeal which was not decided until after the time for payment into the bankruptcy court expired.

3.

The courts erred in disregarding the fact that after the time set in the order had passed while the respondent was contesting that order as erroneous the farmer debtors petitioned the court to be allowed to redeem at the fixed price and to have credit for their National Farm Loan Association stock and for rent money held by the court and the respondent thereupon litigated those claims, thus recognizing that the right of redemption was still alive.

4.

By its appeal from the order it sought the mortgage hold-

er (respondent here) itself stayed the operation of that order so that it could not seek its enforcement, and its contest of the amount to be paid on its secured debt prevented the farmer debtors from obtaining or paying over the amount ultimately to be fixed until it was finally determined.

5.

The holdings of the courts below that notwithstanding the contest through appeal by the mortgage holder (respondent here) of the order it sought and obtained, it yet had a right to have the order complied with during the appeal though by its terms the time it set expired during the appeal, is in direct conflict with the decision of this court in *Bronson* v. *LaCrosse,* 68 U. S. (1 Wall.) 405, and the long-standing adherence to the rule there enunciated.

6.

The contest by the sole beneficiary of the order it sought by attacking the amount of redemption money to be paid into court made it uncertain what sum the farmer debtors had to pay and that uncertainty made it impossible to obtain by loan the sum required to make the full amount ultimately to be required. The courts below erroneously shifted the effect of the respondent's litigation of the order it sought from respondent, where it belonged, to the petitioners.

7.

The mortgage holder (respondent here) through its conduct in contesting by appeal the amount of money to be paid for its benefit is estopped from objecting to redemption by the farmer debtors of their farm merely because payment of the redemption money was delayed as a result of its litigation.

8.

The principle of the decisions of the courts below is untenable because even if the farmer debtors had been able to pay in **the amount originally fixed** by the bankruptcy court within the time set notwithstanding the contest of the mortgage holder (respondent here), and thereafter **by final determination that amount was held to be too small,** the reasoning of these decisions would have required the same conclusion, namely that the order **was not obeyed as finally determined,** and, ergo, the right of redemption was lost.

9.

The principle of the decisions of the courts below is also untenable because if the farmer debtors had paid in the amount of the valuation **within the time originally set** by the bankruptcy court **but short of the time as thereafter finally determined** by the contest of the mortgage holder (respondent here), the reasoning of those decisions would have required the same conclusion, namely that **the order had not been obeyed as finally determined**, and, ergo, the right of redemption was lost.

10.

The decisions of the courts below are untenable because they would throw upon farmer debtors the necessity of gambling upon the decision in the last court to which the contest would be submitted whereas the uncertainty was created solely by the contest conducted by that beneficiary—the mortgage holder (respondent here), who itself sought the very order it contested.

11.

The decisions of the courts below would, if permitted

to become the law, render redemption by a farmer debtor impossible under the statute because any creditor seeking a valuation order and obtaining it and then contesting that order by appeal, could thereby defeat redemption at the value of the security if it could prolong its litigation beyond the time set for payment.

12.

The decisions by the courts below are judicial amendments to the statute which would thwart its purpose by defeating the efforts of a farmer debtor to redeem his farm at its value.

13.

The decisions of the courts below in denying the right of the farmer debtors to redeem in accordance with the purpose of the statute because of the uncertainty created by the respondent mortgage holder's contest of the order it sought, while meantime the time lapsed, is in violent conflict with the decisions of this court in at least seven cases where it directed that the benefits of an unobeyed statute be accorded to litigants who misconceived the law and followed the wrong statute until the time had long passed for obeying the correct one. In those seven cases the appellants could easily have protected their rights of appeal by the long established expedient of invoking both statutes alternatively.

Reconstruction v. *Prudence*, 1941, 311 U. S. 579.
Manufacturers v. *Prudence*, 1941, 312 U. S. 649.
Endelman v. *Prudence*, 1941, 312 U. S. 649.
Kelby v. *Prudence*, 1941, 312 U. S. 649.
Prudence v. *Prudence*, 1941, 312 U. S. 649.
Davison v. *Prudence*, 1941, 312 U. S. 649.
Denham v. *Munson*, 1941, 312 U. S. 650.

14.

In the concurring opinion in *Reconstruction* v. *Prudence,* 1941, 311 U. S. 579, it was said "reversal of the judgment is justified by our broad power to make such disposition of the case as justice requires" citing *Watts* v. *Unione Austriaca,* 248 U. S. 9, 21; *Montgomery Ward & Co.,* v. *Duncan,* 311 U. S. 243, and *Rorick* v. *Commissioners,* 307 U. S. 208, 213.

15.

As to the refusal to allow the farmer debtors to take credit upon the amount fixed by the court for the par value of stock in the National Farm Loan Association, a subsidiary of the Federal Land Bank, which is the mortgage holder and respondent here, such refusal is not consistent with the holding of this court in *Knox* v. *Phillips,* 1937, 300 U. S. 194, because there the National Farm Loan Association was insolvent and insolvency of the National Farm Loan Association involved here is not a factor.

Wherefore your petitioners pray that a proper writ of certiorari may issue to the Circuit Court of Appeals for the Seventh Circuit so that this cause may be determined by this court and for all other relief as may be proper.

Respectfully submitted,

Elmer McClain, Lima, Ohio
Samuel E. Cook, Huntington, Indiana
Counsel for the Petitioner.

Lima, Ohio
January 21, 1944

BRIEF.

In Support of the Preceding Petition for Certiorari.

Note: The Index precedes the petition for certiorari.

All emphasis in this brief is supplied unless otherwise noted.

I.

The Opinions Below.

The opinion of the appellate court below is reported as *Meshberger* v. *Federal Land Bank*, 138 Fed. (2d) 954, and it appears at pages 138 to 142 of the record.

The opinion of the district court, which is not reported, is found in the record at page 71 and the final order of the district court is at page 74.

II.

Grounds on Which the Jurisdiction of this Court Is Invoked.

The basis for the jurisdiction of this court has been set out at page 4 of the preceding petition for certiorari.

III.

STATEMENT OF THE CASE.

Preliminary History.

In 1918 the petitioners gave a mortgage on their farm to the Federal Land Bank, the respondent, to secure a

$9,000 note. They received only $8550 of the loan because they were required to purchase $450 par value of stock in a subsidiary of the respondent, the National Farm Loan Association. This $450 was to be credited on their loan when it was paid. The note and mortgage appear at R. 4 to 10. From the record of payments at R. 6 (together with an additional payment acknowledged at R. 3, paragraph (2)), it is shown that the stipulated payments on the note were made punctually for more than a decade until well after the 1929 crash. In all they paid back to the respondent more money than they received, namely the sum of $8577.63 of which $6620.18 was on interest and $1957.45 was on the principal, leaving a balance yet due of $7042.55. The last payment noted was made in 1933. In addition the petitioners kept the taxes paid on the real estate and paid rental set by the court for more than seven years. R. 61, paragraph 6.

Proceedings for Composition or Extension Under Section 75 (a) to (r).

When the farmer debtor statute was first invoked and for some time thereafter the legislative form and the judicial interpretation of Section 75 were not yet determined and the proceeding was caught in the existing maelstrom of uncertainty.

On October 12, 1934, a petition for composition or extension under Section 75 was filed. A proposal to creditors under Section 75 (a) to (r) failed of acceptance (R. 13).

Proceedings Under Original Section 75 (s).

An amended petition under the **original** Section 75 (s) was then filed. R. 14. An adjudication was entered and the case proceeded under that **original statute** with appraisal, a five year stay order and an order for the payment

of rent. R. 15 to 20. The respondent's first endeavor to obtain a dismissal of the case which occurred at this stage of the proceeding was overruled. R. 18, paragraph 1. **This original Section, 75 (s)** was held to be invalid in *Louisville* v. *Radford*, 1935, 295 U. S. 555, and the proceeding passed out.

Proceedings Under Present Section 75 (s).

Thereafter the **present Section 75 (s)** was enacted and was held valid by this court in *Wright* v. *Vinton*, 300 U. S. 440. The proceeding was accordingly reinstated by order of the bankruptcy court but only for the purpose of ordering the farm to be sold on the application of the respondent. R. 24 to 27. This was the respondent's second attempt to secure a dismissal of the proceeding. The order of sale was reversed on appeal. R. 27 to 28. The opinion in that first appeal is not reported. The three appeals which were taken in this matter are explained in the foot note.[1]

The mortgage holder (respondent here) upon the return of the mandate in the first appeal reversing the order of

---

[1] **Concerning Three Appeals in This Matter.**

In order that the various appeals in this case may not be confusing it is well to stop here to explain that there have been three appeals. Only the second and third are involved here.

First Appeal. The order of sale noted above and found at R. 24 to 27 was the subject of the first appeal wherein the order of sale was reversed. The mandate is at R. 27 and 28. This first appeal is not concerned in this present case. The opinion of the appellate court is not reported. This appeal occurred after the bankruptcy courts all over the country had dismissed farmer debtor cases but were stopped by **John Hancock v. Bartels** 308 U. S. 180.

Second Appeal. The second appeal was taken from a subsequent order that the farmer debtor redeem his farm at $6,000 within one year from May 27, 1941. The appeal, number 7871, entitled **Federal Land Bank v. Meshberger**, was taken by the respondent here to that order and is involved in this present case. It is reported in 131 Fed. (2d) 287. The brief of the appellant (respondent here) in that appeal case is set out in the present record at R. 107 to R. 122.

Third Appeal. The third appeal was from the order of the district court denying the application of the petitioners to redeem after the return of the mandate in the second appeal. This is the appeal to which the present petition for certiorari is directed. It is reported at 138 Fed. (2d) 954.

sale petitioned that the property be valued and an order of redemption issued. The petition was granted, redemption at $6,000 being ordered within one year. R. 28 to 32. This was the third attempt by the respondent to terminate the proceeding as to its security.

Both the respondent and the farmer debtors appealed from this order on the same day, August 7, 1941. R. 39, R. 40. The respondent (the mortgage holder) claimed the $6,000 valuation was too low. R. 42. The respondent's argument in that appeal against the valuation appears in the present record under the heading "Second Assigned Error" at R. 116 to 122.

The respondent also claimed the time for redemption was too long. R. 42, paragraph 1. See its argument in that appeal under the heading "First Assigned Error" R. 112 to 116. The farmer debtor's appeal was dismissed. On the respondent's appeal the $6,000 valuation was affirmed. *Federal Land Bank* v. *Meshberger*, 131 Fed. (2d) 287 Appeal No. 7871. R. 58, first full paragraph and the paragraph which follows ending "It is Affirmed".

The Facts Immediate to the Present Action.

On return of the mandate to the bankruptcy court in the Second Appeal, on the valuation and time for redemption, the petitioners applied for the right to redeem at the $6,000 as affirmed by the appellate court, asserting that $6,000 was available but could not be used for redemption pending determination of the amount on the appeal by the mortgage holder (respondent here). They asserted they were entitled to credit on the $6,000 for the par value of the stock they were compelled to purchase in the National Farm Loan Association when the note and mortgage were executed, and also for rent money paid into court. R. 59

to 61. They later paid the full $6,000 cash into the bankruptcy court. R. 94.

The mortgagor holder (respondent here) attacked the petition to redeem by motion to strike it in whole or in part on the grounds that the farmer debtors should have paid in the $6,000 in compliance with the order while its appeal of that order was pending, and also because they asked for credit for the National Farm Loan Association stock and for rent money held by the court. At the same time it answered, repeating its allegations in the motion to strike and asserting that a public sale was its vested right superior to the right to redeem because redemption was not accomplished pursuant to the order by paying in the $6,000 while its appeal of the order was pending. R. 62 to 65.

The bankruptcy court denied the petition to redeem holding that the original order of the bankruptcy court required the $6,000 to be paid within one year and that the appeal by the mortgage holder which had applied for the order did not affect the farmer debtors' duty to pay that sum into court pending determination of the appeal. A trustee was appointed to sell the farm and the National Farm Loan Association stock at public sale at which the mortgage holder, the respondent here, was expressly authorized to bid its full claim, and the rent money was ordered paid to the mortgage holder in so far as not needed for taxes. All net proceeds were ordered paid to the mortgage holder. Opinion: R. 71 to 73. Order, R. 74 to 76.

The petitioners appealed. R. 78 to 89.

Notwithstanding the appeal the respondent proceeded with the advertisement of public sale whereupon the petitioners filed a supersedeas bond and obtained a stay. R. 95 to 100.

Later the respondent not having desisted from advertising a sale, the bankruptcy court issued a specific writ of supersedeas to the respondent and the sale was stopped. R. 126 to 127.

On the appeal the appellate court sustained the bankruptcy court in denying the right to redeem. *Meshberger* v. *Federal Land Bank*, 138 Fed. (2d) 954. R. 143.

It held that the order of the bankruptcy court setting $6,000 as the redemption price was a peremptory final order which expired during the former appeal, notwithstanding that appeal was taken by the respondent-mortgage holder which had sought that order. It held that the mortgage holder, the appellant there which is respondent here, acquired a vested right to a public sale superior to any right of redemption. The Court in the opinion adverted, as it did when *Wright* v. *Logan*, 315 U. S. 139, was before it, to the fact that the farmer debtors had already "had the benefit of two three year moratorium periods", without mentioning the fact that the delays were not the fault of the farmer debtors and they paid rent to the court for many years though the court had no authority to require it.

This petition for certiorari is to obtain a review of the decision just related.

IV.

Specification of Errors.

1.

The bankruptcy court and the appellate court erred in holding that **the farmer debtors' right of redemption was irrevocably extinguished** merely because when the mortgage holder sought and obtained an order setting an amount and time for redemption and then contested that order by

appeal, on the ground that it was erroneous, the farmer debtors did not pay the amount within the time so fixed by the bankruptcy court, notwithstanding the appeal had not yet finally determined the order.

2.

The courts below erred in holding that **the bankruptcy court had no power to permit the farmer debtors to redeem** on the theory that the mortgage holder succeeded to a vested right to a public sale superior and prior to the right of redemption when the time expired for redemption as named in the order of the bankruptcy court, notwithstanding the fact that the order was sought by the mortgage holder and then contested by its appeal, on the ground that it was erroneous, so that the time expired while the appeal remained yet undetermined.

3.

They erred in holding that **the mortgage holder could smother out the farmer debtors' right of redemption** by seeking an order of the bankruptcy court setting an amount and time for redemption and then appealing from that order when issued, on the ground that it was erroneous, so that the time as set in the order expired while the appeal was pending.

4.

The bankruptcy court could not deny to the farmer debtors their statutory right to redeem this farm by paying the amount so fixed by it and affirmed on appeal merely because the time originally set by it had expired while the order was being appealed by the mortgage holder who had sought and obtained it.

5.

They erred in holding that the farmer debtors' right to redeem was irrevocably lost merely because they did not pay the money into court in the amount and at the time set by the bankruptcy court during the mortgage holder's contest of that order by appeal, when the mortgage holder thereafter appeared and litigated in the bankruptcy court the question of credits to be allowed on that amount.

6.

They erred in not allowing to the farmer debtors credit for the par value of stock in the National Farm Loan Association, a subsidiary of the mortgage holder, which stock they were compelled to purchase by deduction from the amount of their loan so that whereas they borrowed and paid interest on $9,000, they actually received only $8550, insolvency of said subsidiary not being an element in the case.

7.

They erred in not crediting to the farmer debtors on their redemption money the amount of rent money paid in by them and still in the hands of the court and collected from them especially so considering that a large amount of rent was paid under a void order while the proceeding was under the original Section 75 (s).

V.

Summary of the Argument.

1. When the bankruptcy court granted the application of the mortgage holder, the present respondent, for an order fixing the amount of money and setting a time for re-

demption, and then the mortgage holder contested the order by appeal, so that the time set in the order passed by, and when the appeal finally determined the amount to be paid the farmer debtors petitioned for the right to redeem at the fixed price and for certain credits, all of which the mortgage holder resisted by litigation,

As consequences thereof:

The farmer debtors' right of redemption was not thereby extinguished.

Nor did the bankruptcy court thereby lose its power over the proceeding so that it could not permit redemption.

Nor could the mortgage holder by such conduct on its part thus deprive the farmer debtors of their right of redemption at the value of the security and take the farm from them by bidding its accumulated claim which had grown to twice that value.

2. The National Farm Loan Association, not being insolvent, and being a subsidiary of the mortgage holder in which subsidiary the mortgage holder required the borrowers to purchase stock to the extent of 5 per cent, that is $450, of the loan and to pay for it out of the proceeds of the loan so that they received only 95 per cent or $8,550 out of the $9,000 loan, which was to be credited on their debt when paid, the borrowers were entitled to such credit upon the redemption price in the farmer debtor proceeding.

3. The farmer debtors were entitled to have credit upon their redemption for rent money held by the Court when the right of redemption accrued, especially so because the bankruptcy court had collected a large amount of rent which it had no authority to receive.

VI.

ARGUMENT.

Preliminary Considerations.

1. The Main Issue.

Did the passing of the time set for redemption during the respondent's litigation extinguish the right of redemption and vest in the respondent a right to a public sale?

Both courts below based the denial of the right of redemption upon the following form of reasoning:

The order of the bankruptcy court required $6,000 to be paid within one year. It was not paid within one year. Ergo, there can be no redemption.

This reasoning is epitomized in the following statements by the courts below:

By the bankruptcy court:

> "The order of May 27, 1941, required the deposit in court of $6,000 within a period of one year from that date." R. 73, middle of page.

By the appellate court:

> "In the first place, the court's order of July 10, 1941, fixing the reappraised value of the property and providing for a one year redemption period was a final order." R. 140, third whole paragraph.

Both courts held that such conclusion was in no way to be modified by the fact that the mortgage holder, although it sought the order, yet considered it erroneous, refused to accept it, and contested it through the district court by petition to review and through the appellate court by appeal, until long after the time set in the order expired.

(In the foot note is a reference to the partial recognition by the appellate court of the correct reasoning.[2])

The Respondent's Litigation of the Order As Erroneous.

The respondent's relation as mortgage holder to the order, which it sought and obtained and then appealed, is here traced through the various documents in the record.

---

[2] The supervising conciliation commissioner was ordered by the judge to **"fix such value;** also **to fix a time** in which this debtor shall redeem said real estate." R. 30. The order entered by the supervising conciliation commissioner on May 27, 1941, fixing the time at one year, was thus a final order and the one year for redemption ran from that date. R. 30, at 31, second half of the page. This order was subject to review by the district judge precisely like the order of the judge confirming it (R. 32, order entered July 10, 1941) was subject to review by the Court of Appeals. Whatever reasoning would require a modification of the supervising conciliation commissioner's order of May 27, 1941, because of review by the district judge, would apply with equal force to the review by the appellate court. The respondent has throughout consistently maintained that the year expired May 27, 1942, that is one year from its entry by the supervising conciliation commissioner. See answer of the respondent R. 64, paragraph 4, continuing to top of R. 65. Also its brief in the appellate court, R. 113, paragraph in middle of the page beginning "The valuation". While that (the second) appeal was still pending and before argument the appellant filed in the appellate court a motion entitled "Motion of Appellant to Remand Cause" (which is quoted in full in Note 3, page 27 of this brief) for an order to the district court "for immediate entry of an order of sale with leave to hold its place on the docket of this (appellate) court for determination of (1) the reasonableness of time allowed prior to sale to redeem, and (2) the reasonableness of the market value of the farm in question in the event the lower court refuses to order a sale of said property, **the one year period of redemption having expired** on May 27, 1942." Also as shown above, the district court maintained that the year ran from May 27, 1941, when the supervising conciliation commissioner entered the order. R. 73, middle of page, paragraph beginning "The order". Yet the appellate court held that the year ran not from the entry of the supervising conciliation commissioner's order on May 27, 1941, but from the date when the district judge affirmed that order on review on July 10, 1941. R. 140, middle of page, paragraph beginning "In the first place".

R. 29: **From the respondent's petition for the order, signed by the attorneys for the Federal Land Bank:**

> "That your petitioner believes that in justice to all parties this court should itself fix the value of the property, after proper hearing.
>
> Wherefore **your petitioners pray: That the Court . . . fix and determine the value of the real estate . . . entering an order directing the debtor to redeem the said real estate at the said value so fixed by this court within a stated reasonable time,** not to exceed ninety (90) days . . ."

R. 30. **The judge referred the motion to the supervising conciliation commissioner "to fix such value; also to fix a time at which this debtor shall redeem".**

R. 30 and 31: **From the order of the supervising conciliation commissioner granting the petition of the respondent:**

> "This cause coming on to be heard upon the verified **petition filed** jointly **by The Federal Land Bank of Louisville,** Kentucky, and the John Hancock Mutual Life Insurance Company, **asking to have the value of the real estate** upon which the above petitioners hold a lien, **fixed** by hearing, **and a time for redemption, ordered,** that said petition having been heard . . . the court now finds that: . . . As to the real estate upon which the Federal Land Bank of Louisville, Kentucky, holds a lien consisting of 120 acres, more or less, that **the value** thereof **is fixed at $6,000, that a reasonable time** within which to redeem said real estate **is fixed at one year** from the date of this order. . . . Dated this 27th day of May . . . 1941."

R. 32: **A petition for review of the supervising conciliation commissioner's order was filed by the respondent** which

is not set out in the record but the order of the judge of the district court on review shows:

. . . "**petition of Federal Land Bank to review denied.** Order of Supervising Conciliation Commissioner confirmed. July 10, 1941."

R. 40: **From the respondent's notice of appeal** (this was the Second Appeal):

"Notice is hereby given that **The Federal Land Bank of Louisville . . . appeals** from a certain order entered in this cause by this Court on the 10th day of July, A. D. 1941" . . .

"**The appellant believes** that by reason of the entry of said order, **certain errors were committed** by the Court to the prejudice of the appellant, all of which will in more detail appear in the appellant's points of alleged error, which is filed with and accompanies this notice."

R. 42: **From the respondent's Statement of Points of Alleged Error on the Second Appeal:**

"1. **The Court erred in denying the petition of the Federal Land Bank** of Louisville to review the report and order of the Supervising Conciliation Commissioner and in confirming the order of the Supervising Conciliation Commissioner, **because the time given in the record and order** of the Supervising Conciliation Commissioner in which the Debtor could redeem **was not reasonable, being too long.**

2. **The Court erred in denying the petition of The Federal Land Bank** of Louisville to review the report and order of the Supervising Conciliation Commissioner and in confirming the order of the Supervising Conciliation Commissioner, **for the reason that said report and order** of the Supervising Conciliation Commissioner **fixed too low a valuation** upon the real estate.

Wherefore the said **The Federal Land Bank** of Louisville **prays:**

That the judgment be reversed and for such other relief as to the court may seem fitting and proper."

R. 43: **From respondent's bond on the Second Appeal:**

"Whereas the above named **The Federal Land Bank** of Louisville **has prosecuted an appeal** to the Circuit Court of Appeals for the Seventh Circuit **to reverse an order** in the above-entitled cause, . . ."

R. 44: **From the order of the District Court allowing the Second Appeal of the respondent:**

"This cause being before the court on **the notice of and petition for appeal** in the above cause . . ., statement of points of alleged error, bond, and designation of portions of the record, proceedings and evidence to be contained in the record on appeal, all **filed by the petitioner Creditor, The Federal Land Bank** of Louisville," . . .

R. 108: **From the brief of the appellant (respondent here) in that Second Appeal** which appears in the present record of the Third Appeal:

"In the United States Circuit Court of Appeals for the Seventh Circuit, No. 7871 . . . **The Federal Land Bank of Louisville, Appellant,** vs. Rufus Meshberger, Appellee. Appeal from the District Court of the United States for the Northern District of Indiana . . . Appellant's Brief . . . The appeal is taken from an order of the court below, fixing the value of the property and giving the debtor a year in which to repurchase the property . . . **Appellant asserts that the value fixed was too low, that the granting of a year . . . was improper**" . . .

R. 110: Quoting further from the brief of the appellant, respondent here, in that Second Appeal:

"The sole issues presented by this appeal arise from the exceptions and petition to review filed by the appellant, The Federal Land Bank of Louisville to the report and order of the Conciliation Commissioner based on two grounds:

(1) That the report and **order was erroneous in giving the debtor a year from the date of the order in which to redeem the real estate** at the appraised price; and,

(2) That **the valuation in the report and order was too low** and did not represent the proper valuation of the real estate.

The action of the Court below, in overruling these exceptions and petition to review, is the error complained of in this appeal . . ."

R. 116: Quoting still further from the brief of the appellant, respondent here, in that Second Appeal:

"The court erred in denying the petition of the Federal Land Bank of Louisville to review the report and order of the Supervising Conciliation Commissioner, for the reason that the said report and **order of the Supervising Conciliation Commissioner fixed too low a valuation upon the real estate.**"

R. 117 to 122 inclusive: Then follow five and a half pages of argument to support the contention of the appellant, here the respondent, in that Second Appeal, that the valuation was erroneous and should be increased. Just before the Summary of its argument the brief at R. 122 says:

"**The valuation** fixed by the Supervising Conciliation Commissioner **was clearly erroneous,** being too low, and **the order of the District Court, affirming the ruling of the Supervising Conciliation Commissioner as against the petition to review, should be reversed.**"

"Motion of Appellant to Remand Cause" [3] In the appellate court on October 9, 1942, before the Second Appeal was decided, and long after the year named in the original order had expired, the appellant, now respondent here, filed its "Motion of Appellant to Remand Cause", in the Second Appeal, to remand the case to the District Court for immediate sale of the farm with leave to hold its place on the docket of the appellate court for determination of "(1) the reasonableness of the time allowed prior to sale to redeem, and (2) the reasonableness of the market value of the farm in question in the event the lower court refuses to order a sale of said property."

---

[3] As to this "Motion of Appellant to Remand Cause" it seems that it was intended to designate it into the present record but was omitted by oversight. It was set out verbatim in the petitioner's brief in the appellate court on the **third** appeal with the statement that if its authenticity was questioned it would be made a part of the record. It was not questioned. As it appeared at page 31 of the Meshberger brief in the appellate court on the **third** appeal it read as follows:

"IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit

In the Matter of Rufus Meshberger, et al., Debtor,

Federal Land Bank of Louisville,
Appellant,

vs.

Rufus Meshberger and Lelia B. Meshberger,
Appellees.

Motion of Appellant to Remand Cause.

Comes the Federal Land Bank of Louisville, and moves the Court to remand this cause to the United States District Court for the Northern District of Indiana, Fort Wayne Division, for immediate entry of order of sale with leave to hold its place on the docket of this Court, for determination of (1) the reasonableness of the time allowed prior to sale to redeem, and (2) the reasonableness of the market value of the farm in question in the event the lower court refuses to order a sale of said property, the one year period of redemption having expired on May 27, 1942, and redemption not having been made.

(Signed) Theo. W. Bates
(Signed) J. W. Williamson
Attorneys for Federal Land Bank of Louisville."

A Resume of the Facts on This Point.

The foregoing extracts from the record just quoted show:

1. The respondent petitioned for an order.
2. The respondent's petition was granted.
3. The respondent petitioned for a review of that order.
4. The respondent's petition for review was denied and the order was sustained.
5. The respondent appealed.
6. The respondent maintained its contest of the order throughout the appeal.
7. The order was finally sustained on the appeal against the objections of the respondent.

That is, the respondent asked for an order, got it, then contested it by appeal through two courts and the time set for compliance with that order expired before the appeal was determined.

An Examination of the Reasoning of the Courts Below.

The holding of the lower courts that the order to pay within one year was as immutable as the law of the Medes and Persians disintegrates when an attempt is made to put it to work.

1. It broke down within the appellate court itself which ostensibly applied it as has been demonstrated in Note 2. That court held that the order of May 27, 1941 (R. 30 at 32) ran **not from its entry but from its affirmance** on July 10, 1941, after decision by the judge on petition for review. R. 32. The assumed immutability was shattered right there.

2. If the order were really immutable, it must withstand all possible uncertainties of the litigation in the appellate court. By that test if the $6,000 had been paid within a year, the farmer debtors were by statute entitled at once

to an order freeing the farm of all liens, for the statute says:

> . . . "The debtor shall then pay the value . . . into court . . . and **thereupon the court shall,** by an order, **turn over** full possession and title of **said property, free and clear of all encumbrances** to the debtor." Section 75 (s) (3).

That is, thereby the respondent's lien would have been obliterated. Yet on final determination the appellate court might have held the $6,000 to be too small or the time too long. Then there would have existed a direct conflict between the judgment and a statute which the Constitution says shall be the supreme law of the land.

The theory supporting such reasoning raises interesting questions. For example:

Query: What would have been the result if the order as finally determined set the time for 90 days, but the redemption had already been made pursuant to the original entry after ninety days but within the year? or,

Query: What would have been the result if the order as finally determined (in the appellate court or elsewhere) fixed the valuation at $7,500 but the redemption had already been made pursuant to the original entry within time by paying $6,000?

The conclusion forces itself upon any consideration of the subject that when the respondent appealed from a judgment in its favor, it could not, after its appeal was determined, change its tactics by insisting that after all the appellee should have complied with the order which it contended with all its might was erroneous. To permit one to appeal from an order granted upon his application which he contests as erroneous, and afterwards when his appeal is decided against him, to claim the order should have been obeyed while he endeavored to overthrow, it is against all conceptions of common sense.

Conflict with the Rule Recognized by This Court.

Indeed this court has already spoken sharply on the subject, it said:

> "**They having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it, pending the appeal. They assert that the decree is founded in error and for that reason should not be executed, but should be reversed and corrected in the appellate tribunal.** The appeal suspends the execution of the decree. This is not a case where security is to be given in order to supersede the execution. That rule applies in cases where the decree or judgment is against the party appealing, and who desires to suspend the issuing of execution by the adverse party until the appeal is heard and determined." *Bronson* v. *LaCrosse*, 68 U. S. (1 Wall.) 405.

In that case the appellant appealed from a decree of foreclosure and applied to the lower court for the proceeds of the operation of the security, a railroad, during the pendency of the appeal. The rule of this case has been uniformly recognized.

It is recognized in 6 Cyclopedia of Federal Procedure, page 341, where it is said:

> "Unless the decree or judgment is one capable of execution by appellee pending the appeal, there is no reason or need for a supersedeas. Accordingly one appealing from a decree or judgment in his own favor supersedes it by so appealing, and can not execute it; and the subsequent taking of a cross-appeal does not alter the case."

The decisions of the courts below are also in conflict with other applicable decisions of this court:

Reconstruction v. *Prudence*, 1941, 311 U. S. 579,
Manufacturers v. *Prudence*, 1941, 312 U. S. 649,
Endelman v. *Prudence*, 1941, 312 U. S. 649,

Kelby v. *Prudence*, 1941, 312 U. S. 649,
Prudence v. *Prudence*, 1941, 312 U. S. 649,
Davison v. *Prudence*, 1941, 312 U. S. 649,
Denham v. *Munson*, 1941, 312 U. S. 650.

In the *Prudence* and *Denham* cases the appellants were confused by the provisions of Section 24 (b), and 250 of the Bankruptcy Act, 11 U.S.C. 47 (b) and 650, and Rule 73 (a) of the Federal Rules of Civil Procedure and General Order 36. These provisions had been construed in one court to permit appeal as a matter of right by notice in the District Court and by another as requiring allowance by the appellate court upon application to it. The appellants guessed wrong and took their appeal by notice in the district court in accordance with the holding of their Circuit Court of Appeals. Long after the time for appeal had expired the court decided that such an appeal by notice in the District Court was void.

Now there was no excuse for the failure of the appellants in these seven cases to appeal the right way because for many years a similar confusion existed under the Bankruptcy Act of 1898 which was met by the simple expedient of taking an appeal in the district court and at the same time applying to the appellate court for leave to appeal. These appeals were called "alternative appeals." However this court held that it would be extremely harsh to deprive the appellants of their rights and reversed the appellate court which had dismissed the wrongly taken appeals. The confusion, although created by the legislative and judicial departments of the government, could have been easily resolved by the appellants through the employment of a long-recognized remedy. The appellees were guiltless of any part in creating the confusion.

On the other hand the confusion in the instant *Meshberger*

case was wholy created by the appellant, the present respondent, through its appeal of an order sought and obtained by it which it contended was erroneous. The petitioners had no part in creating the dilemma but they were helpless. There was no expedient they could employ.

The only answer to their plea is the harsh one that they should not have to borrow, they should have had the cash in their pockets. If they had possessed so much ready cash they would not have had to invoke Section 75 as farmer debtors who were unable to meet their debts as they matured. Section 75 (c). But as shown under the heading "Some Practical Considerations" which follows, even the payment of the required $6,000 within the time as set by the bankruptcy court would have been futile if the appellate court had held the $6,000 too small or the payment too late.

Some Practical Considerations.

Aside from its violation of the principles of jurisprudence the basis of the holding of the lower courts breaks down when subjected to the "practical experience of the world."

As a preliminary consideration it will be recognized that no reasonable person can assume that Section 75 contemplates a redemption solely with funds earned by the farmer debtor during the pendency of the proceeding under it. It is based on the assumption that with (1) what he can earn plus (2) what he can borrow he (3) can redeem his farm at its **value.** Unless these three factors coexist he is as stranded when he comes out as he was when he went in. If he can not borrow on the value of his security and by adding the proceeds of the loan to his earnings redeem his farm at its value, **the purpose of the statute is thwarted by**

giving to the secured creditor the farm instead of its value which is all he is entitled to. This was epitomized in *Wright* v. *Union Central*, 311 U. S. 273, at page 278, where this court said:

> "This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt. *Wright* v. *Union Central Life Ins. Co.* [304 U. S. 502]; *John Hancock Mutual Life Ins. Co.* v. *Bartels*, [308 U. S. 180]; *Kalb* v. *Feuerstein*, 308 U. S. 133. **Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property.** *John Hancock Mutual Life Ins. Co.* v. *Bartels*, at pp. 187-188; *Borchard* v. *California Bank*, [310 U. S. 311], page 317. **There is no constitutional claim of the creditor to more than that.** And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress (*John Hancock Mutual Life Ins. Co.* v. *Bartels*, [308 U. S. 180]; *Kalb* v. *Feuerstein*, [308 U. S. 133]) lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."

The theory applied by the courts below required the petitioners, under penalty of forfeiture of their right to redeem, to apply for a loan to make up enough money to meet the order that $6,000 be paid within one year and to do so during the contest of that order by the mortgage holder on the ground that it was erroneous both as to amount and as to time.

Under that hypothesis let it be assumed that they go

out in the practical world of business and apply for the necessary sum. The lender investigates the characters of the applicants and examines the farm. He notifies them that he will make the loan when satisfactory evidence of title is presented. Thereupon their abstract of title is brought up to date and examined. He tells them it shows an order to pay the $6,000 by May 27, 1942, but also that the order has been appealed by the present mortgage holder who claims the $6,000 is too low and the one year is too short. They say "Yes, but we intend to comply with that order before it expires". His answer is "If I let you have the money and you pay the $6,000, both you and I are headed for trouble because the appellate court may hold the $6,000 is too low, or it may hold that one year is too long. I am sorry I can't make the loan, because I am not satisfied it would be a good one."

But, says the present mortgage holder, respondent here: "That is readily solved. Let the $6,000 lay in the District Court until the appellate court decides". The lender replies, "Yes, but the statute says when the $6,000 is paid in 'thereupon the court shall by an order' turn the farm over to the owners. How am I to know whether the court will or will not follow the statute? With my money in court, no matter what the court does, how am I to get my money back if the $6,000 is the wrong sum or the time when it was paid was too late, according to the decision of the appellate court that is yet to come? We will have to wait until the case is decided."

Bereft of all other arguments the mortgage holder, our respondent, now says "Yes, but what about 'good faith'? They showed lack of good faith by not complying with the order". Coming from the mouth of an appellant who, all

the time the order ran according to its original wording, was strenuously arguing that the order was erroneous both as to amount and as to time (see R. 112 to 122) this argument is not convincing. The petitioners showed their good faith in the only way it could be shown. When the Second Appeal was ended they got a commitment for a loan as high as $6,000 from a Bank. R. 61, paragraph 6. R. 101, middle of the page. And they paid $6,000 into the district court while the third appeal was yet pending in the district court. R. 94.

There is yet another practical demonstration of the effect of the mortgage holder's attack on the order and of the "good faith" of the petitioners. It will be noted that the very order attacked by the respondent here also contained an order for redemption of 70 acres mortgaged to another mortgage holder to be redeemed at $3,000 within six months. R. 30, paragraph I and also in paragraph II. It is a fact, which the respondent will not deny, that the $3,000 mortgage holder did not attack the order and that redemption was effectuated promptly.

If Jurisdiction Had Expired, Respondent Restored It.

After the mandate came back to the bankruptcy court in the Second Appeal the petitioners then apprised the court that they had the $6,000 available for redemption (which they later paid into court, R. 94) and requested that they be permitted to redeem and also asked for credit for their National Farm Loan Association stock and for rent money held by the court. R. 59. The respondent immediately contested the right to any such credits. R. 63, (2) and (3), at top of page, R. 63, at R. 64, paragraphs 2 and 3. There-

by the respondent recognized that the case was still open for redemption.

If the holding of the courts below and the arguments of the respondent which prevailed there are to be interpreted to mean that the bankruptcy court which had complete jurisdiction and power over the right of redemption lost them merely because the time for redemption set by it was passed over while the respondent was contesting the validity of the order, then the respondent itself revived or restored that jurisdiction and power by coming back into the bankruptcy court and litigating there the mode or method of redemption as distinguished from the power or jurisdiction of the court. When it plead and argued that it was entitled to the full $6,000 without deduction for National Farm Loan Association stock or rental payments it restored, rather it conceded, the court's jurisdiction and power over the right of redemption. It plead to the merits and thereby waived objection to the restoration of the jurisdiction which the court once had. This principle is of ancient lineage.

"If the court once have jurisdiction of a cause and have exercised it so that their power is gone, consent can restore it" 12 American and English Encyclopedia of Law, page 299. *Toland* v. *Sprague*, 37 U. S. (12 Peters) 300. 93 A. L. R. 1302.

In recapitulation it is submitted that because the respondent obtained an order setting the amount and time for redemption which order the respondent immediately

attacked as erroneous, and litigated by its petition to review and by its appeal until long after the time named in the order had passed, the decisions of the courts below are in conflict with the applicable decisions of this court, and a departure from the accepted and usual course of judicial proceedings as well as repugnant to the letter and the purpose of the statute.

The right of redemption was not extinguished because the time named for redemption passed by during the litigation. Nor did the bankruptcy court lose its power to permit the redemption.

Nor could the mortgage holder by the expedient of seeking the revocation of the very order it sought on the ground that it was erroneous, create in itself a vested right to take the farm by bidding its debt superior to the right of the farmer debtors to redeem it at its value.

We pass to the other points to be discussed.

2. N. F. L. A. Stock.

Do the petitioners as borrowers from the respondent, a Federal Land Bank, have the right to credit on their loan of par value of stock in the National Farm Loan Association, the subsidiary through which they obtained their loan from the respondent, and to which stock they were required to subscribe to pay for out of the amount of their loan? They borrowed and paid interest on $9,000 but received only $8,550 because 5 per cent or $450 of the loan was taken to purchase stock in the subsidiary of the respondent. By contract the Federal Land Bank was bound to refund the $450 when the loan was paid unless the Na-

tional Farm Loan Association was insolvent. There is no claim that the National Farm Loan Association was or is insolvent.

The petitioners asked for credit for the par value of their stock pursuant to their contract. R. 61, paragraph 6.

In *Knox* v. *Phillips,* 1937, 300 U. S. 194, this court held that if the National Farm Loan Association be insolvent the Federal Land Bank is not bound to credit such stock on the loan when paid. Insolvency is not involved here.

Section 75 (s) (3) provides explicitly that when the farmer debtor pays into court the appraised, or reappraised value "thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of all encumbrances to the debtor". This court has held that the mortgage holder is protected to "the extent of the value of the property and there is no constitutional claim of the creditor to more than that". *Wright* v. *Union Central,* 311 U. S. 273, at page 278.

The respondent withheld $450 from the petitioners when the loan was made so that they actually borrowed $8550, not $9,000. If the $450 is not refunded then whose money is it? If the respondent is to keep it thereby the provision of Section 75 (s) (3) is amended to read: When the appraised, or reappraised, value is paid into court "thereupon the court shall turn over full possession and title to the property free and clear of all encumbrances to the debtor except when he is a borrower from a Federal Land Bank which shall be permitted, in addition to the said value, to retain any stock subscriptions in any subsidiary."

The mechanics of this 5 per cent stock purchase is that when the borrower pays his 5 per cent to the National Farm Loan Association he is issued stock in that associa-

tion of equal par value and the National Farm Loan Association subscribes to an equal par value of stock in the Federal Land Bank. Thus the Federal Land Bank took interest from the borrower on $450 while it kept the $450 to use in its business. It insists that when the loan is paid under Section 75 it may keep on keeping the $450.

The petitioners submit that this question, which has not been passed upon by this court, should be determined, and they claim they are entitled to credit on their redemption in the sum of $450 which the Federal Land Bank now has.

We pass to the third point.

3. Rent Money.

What disposition is to be made of the rental money remaining in the hands of the court at redemption?

The farmer debtors paid rent to the court, not only under the present Section 75 (s) but prior to its existence, while the invalid original Section 75 (s) was being followed. They alleged, and there is no controversy on the fact, that they "have kept the taxes paid on the real estate and have paid the rental fixed against said land for over seven years".

As between the respondent which has received the benefit for seven years of rental, at least four years of which was illegally demanded—for Section 75 (s) (2) authorizes rent to be charged for only three years—and the petitioners who paid the money, the equities would seem to

lie with the petitioners that the money lying in the lap of the court when redemption is consummated, should be credited on the redemption.

This question also the petitioners submit has not been determined and should be passed on by this court.

CONCLUSION.

Therefore it is submitted that:

> " . . . to hold that the court has the discretion to deny or to grant the debtor's right to redeem at the reappraised value or at the value fixed by the court, dependent on general equitable considerations, would be to rewrite the Act, so as to vest in the court a power which Congress did not plainly delegate." *Wright* v. *Union Central*, 311 U. S. 273, at page 281.

The decisions below involve important questions relating to the administration of an act of Congress which have not been finally determined.

They are in conflict with applicable decisions of this court.

They depart from the accepted and usual course of judicial proceedings and call for the exercise of this court's power of supervision.

They are in conflict with the provisions and with the spirit and purpose of Section 75 of the Bankruptcy Act.

They deny to the farmer debtors the application of equitable principles to the situation directly created by the mortgage holder.

They call for the broad power of this court to make such disposition of the case as justice requires.

The petitioners have therefore prayed in their petition that certiorari be granted.

Respectfully submitted,

ELMER MCCLAIN, Lima Ohio
SAMUEL E. COOK, Huntington, Indiana,
Counsel for the Petitioner.

Lima, Ohio
Feburary 11, 1944.

(2)

No. 754.

Office of the Clerk, U. S.
APR 3 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1943.

RUFUS MESHBERGER AND LELIA B. MESHBERGER,
Petitioners,

versus

THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WILLIAM C. GOODWYN,
THEO. W. BATES,
E. H. ROMER,
224 E. Broadway,
Louisville, Kentucky,
Counsel for Respondent,
The Federal Land Bank of Louisville.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

PAGE

STATEMENT 1

Reasons Why Writ Should be Denied:

1. The substantive law and rules of procedure laid down by this Court in construing the applicable provision of Section 75 (s) have been complied with 3

2. The respondent's appeal from the May 27, 1941 order of the District Court did not suspend the running of the period of redemption during the pendency of the appeal. 4

3. The petitioners are not entitled in equity to invoke jurisdiction of this Court in view of their dilatory conduct and their failure to petition this Court to review the October 9, 1942 order of the Appellate Court. 6

4. The Appellate Court having found that the period of redemption expired May 27, 1941 was not required to adjudicate the further questions of claimed credits urged by the petitioners 9

Conclusion 10

CASES AND AUTHORITIES CITED.

A. Cases.

	PAGE
Bronson v. LaCrosse R. R. Company, 1 Wall. 405, 68 U. S. 405	4
Federal Land Bank of Columbia v. Gaines, 290 U. S. 247	1
Federal Land Bank v. Priddy, 295 U. S. 229	1
Federal Land Bank v. Bismarck Lumber Company, 314 U. S. 95	2
Federal Land Bank of Louisville v. Meshberger, 131 F. (2d) 287	4
Knox National Farm Loan Association v. Phillips, 300 U. S. 194	2
Meshberger v. Federal Land Bank of Louisville, 131 F. (2d) 287	4
Reconstruction Finance Corporation v. Prudence S. Adv. Corporation, 311 U. S. 579	6
Smith v. Kansas City Title and Trust Company, et al., 255 U. S. 180	1
Wright v. Union Central Life Insurance Company, 311 U. S. 273	3

B. Statutes.

11 U. S. C. §203 (s)	3

Supreme Court of the United States

October Term, 1943.

No. 754.

RUFUS MESHBERGER AND LELIA B. MESHBERGER, *Petitioners,*

v.

THE FEDERAL LAND BANK OF LOUISVILLE, - *Respondent.*

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To said Honorable Court:

The statement of the case as set out in petitioners' petition (pages 3-4) and brief (pages 12-17) does not mention some of the material facts and recites erroneous conclusions as to others:

1. The national farm loan association through which the Meshberger loan was made is not a "subsidiary of the respondent." This court has considered the organization, operations and functions of Federal land banks and national farm loan associations and their relationship to each other in—

Smith v. Kansas City Title and Trust Company *et al.*, 255 U. S. 180

Federal Land Bank v. Gaines, 290 U. S. 247

Federal Land Bank v. Priddy, 295 U. S. 229

Knox National Farm Loan Association v. Phillips, 300 U. S. 194

Federal Land Bank v. Bismarck Lumber Company, 314 U. S. 95.

and held that the associations and banks are distinctly different corporations. The association has never been held to be a "subsidiary" of the Federal land bank.

2. Petitioners state in their brief on page 13 that they "kept the taxes paid on the real estate and paid rental set by the court for more than seven years" and refer to an allegation of their petition to redeem as the evidence of that fact. We have been unable to ascertain whether or not the fixed rental was paid. Assuming that rental has been paid, there is nothing in the record to indicate its amount or that it has been in the sum as fixed by the order of March 21, 1935 (Record, page 18, paragraph 6), it is a great deal less than the earning capacity of the property for the past several years. No part of the rent, nor any other money, has been paid to the respondent by the petitioners or any one on their behalf since 1933. They have continued in their possession of the real estate and have had the benefit of the income from the farm at all times.

3. No reference is made in petitioners' statement of the facts that they recognized the finality of the order fixing the value of the property at $6,000.00 and giving one year in which they could redeem at that value and actually took an appeal from it. It was this order which was affirmed by the appellate court, moreover. As a matter of fact the petitioners' appeal (Record, page 37) was prior in point of time to that of the respondent (Record, page 44); and the only bond executed in connection with the petitioners' or the respondent's appeals was the respondent's cost bond of $250.00 (Record, page 43).

REASONS WHY THE WRIT SHOULD BE DENIED.

1. The May 27, 1941 order of the district court (Record, pages 30-32) was made pursuant to the order of the appellate court in disposing of the petitioners' appeal from the order of June 20, 1940 (see mandate, Record, pages 24-27). This is the "First Appeal" referred to in the footnote on page 14, of petitioners' brief. The order fixed the value at $6,000.00 and gave the petitioners until May 27, 1942 to redeem at that value. The court's direction to have the value and redemption period fixed was in compliance with the provisions of 11 U. S. C. §203 (s) (3), and was authorized by this court's decision in Wright v. Union Central Life Insurance Company, 311 U. S. 273, which was decided December 9, 1940. Mr. Justice Douglas wrote the opinion for the court in that case, stating at page 281 that the farmer

> "Was entitled to have the property reappraised or the value fixed at a hearing; that the value having been determined at a hearing in conformity with his request, he was then entitled to have a reasonable time, fixed by the court, in which to redeem at that value; and that if he did so redeem, the land should be turned over to him free and clear of encumbrances and his discharge granted. Only in case the debtor failed to redeem within a reasonable time would the court be authorized to order a public sale."

Applying the rule in the Wright case to the case at bar we find that the district court fixed the value of the petitioners' land under lien to the respondent at $6,000.00 and gave the petitioners one year from May 27, 1941 to redeem. The petitioners did not take any steps to redeem until (1) the appellate court had held on October 9, 1942

that the one-year redemption period expired May 27, 1942 (Record, page 55), (2) the time for filing petition for rehearing had expired, (3) the mandate had been filed in the district court and (4) the respondent had on November 28, 1942 filed a motion for the appointment of a trustee and an order directing sale of the property (Record, pages 53-59).

In refusing to deposit $6,000.00 in court on or before May 27, 1942 the petitioners failed to comply with the provisions of the order of May 27, 1941. That order became final and binding on the petitioners and the respondent as of the date of its entry upon the dismissal of the petitioners' appeal and affirmance of the respondent's appeal. Meshberger v. Federal Land Bank of Louisville and Federal Land Bank of Louisville v. Meshberger, 131 F. (2d) 287 (Record, pages 55-58). The petitioners did not attempt any review or appeal of the appellate court's decision.

2. The petitioners—in making an effort to justify their non-redemption on or before May 27, 1942—contend that the respondent's appeal suspended the running of the one-year redemption period from May 27, 1941, and the year of redemption did not start to run until October 9, 1942.

Bronson v. LaCrosse R. R. Co., 1 Wall. 405, 68 U. S. 405, decided in 1864, does not support their contentions. The principal question in that case was one concerning the construction and application of the Federal statutes of July 15, 1862 and March 3, 1863 regarding the powers of circuit and district courts. This court held that the former Act deprived the district court of further jurisdiction which the second Act did not restore. As shown by Mr. Justice Catron, the rest of the opinion is *obiter dicta* It is true that certain bondholders, pending an appeal by

them from a judgment decreeing foreclosure of the mortgage securing their bonds, were said by Mr. Justice Nelson not to be entitled to execution of the decree in their favor pending appeal. But this statement has no bearing on the position of the petitioners in this case. They were the successful parties under the district court's order of May 27, 1941 affirmed by the appellate court. They were allowed to redeem the mortgaged real estate within one year at $6,000.00 (an amount (a) considerably less than respondent's proven debt and (b) considerably less than the value of the security contended for by the respondent and supported by the evidence offered in its behalf). The respondent resisted this judgment adverse to it but did not supersede or enjoin its enforcement. Therefore, pending appeal the petitioners, who were the successful parties, could have effected redemption at the fixed valuation of $6,000.00 during the fixed redemption period of one year ending May 27, 1942.

Mr. Justice Nelson fully recognized the settled rule against the contention of the petitioners, stating, at page 410 (68 U. S.):

> ". . . This is not a case where security is to be given in order to supersede the execution. That rule applies in cases where the decree or judgment is against the party appealing, and who desires to suspend the issuing of execution by the adverse party until the appeal is heard and determined. . . ."

It is well settled, as recognized by Mr. Justice Nelson, where a losing party does not supersede a judgment or decree against him, that the successful party in the absence of supersedeas or injunction may enforce the judgment in his favor. The appellate court, in accordance with the authorities, so held in Federal Land Bank of Louis-

ville v. Meshberger, 131 F. (2d) 287. In order to save the question and their contention that the redemption period was suspended pending the appeals the petitioners should have appealed from that decision of the appellate court.

3. In seeking now to invoke the jurisdiction of this court, petitioners admit their dilatory conduct in the prosecution of their cause and their failure to take proper and timely action in the court below, in order to have protected and preserved their redemptive rights under the district court's order of May 17, 1941. In an effort to avoid the logical result of their negligence, they now appeal to this court to grant certiorari notwithstanding, and cite as authority for their plea, this court's decision in the case of Reconstruction Finance Corporation v. Prudence S. Adv. Group, 1941, 311 U. S. 579.

It is respectfully submitted that the decision cited is not authority for petitioners' contention and that the circumstances existing in this case are in no manner analogous to the circumstances that prevailed in that case. Appellants in the cited case, relying on a decision of the Circuit Court of Appeals, endeavored to take appeals by filing, within the appeal period provided by §25 (a) of the Bankruptcy Act, notices of appeal in the district court. No application for leave to appeal was made to the Circuit Court of Appeals. However, the Circuit Court of Appeals took the matter under advisement; and while it was in that court, this court decided Dickinson Industrial Site v. Cowen, 309 U. S. 382, holding allowance of the appeals by the Circuit Court on application to it, necessary. Upon authority of the Dickinson case the Circuit Court of Appeals, on motion of certain respondents, thereupon dismissed the appeals, holding that since appellants did not seek an allowance of their appeals within the time pre-

scribed in §25 (a) (which time had in the interim expired), it had no jurisdiction to allow the appeals. Mr. Justice Douglas, delivering the majority opinion at page 582 said:

> "The procedure followed by petitioners was irregular. *Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient. . . . The court has discretion, where the scope of review is not affected, to disregard such an irregularity in the interests of substantial justice.* . . . In this case the effect of the procedural irregularity was not substantial. The scope of review was not altered. There was *no question of the good faith of petitioners, of dilatory tactics, or of frivolous appeals.* Hence it would be extremely harsh to hold that petitioners were deprived of their right to have the court exercise its discretion on the allowance of their appeals by reason of their erroneous reliance upon the permanency of London v. O'Dougherty (CCA 2d) 102 F (2d) 524, 39 Am. Bankr Rep (NS) 337, *supra.*" (Emphasis ours)

In the concurring opinion Mr. Justice Reed, at page 583, said:

> "I am of opinion that timely application to the Circuit Court of Appeals for leave to appeal is a jurisdictional requirement, and that the practice followed in this case cannot be reduced to a mere procedural irregularity. *However, when petitioners filed their notices of appeal in the District Court the proper procedure was not settled, and petitioners were misled by the decision of the court below in London v. O'Dougherty* (CCA 2d) 102 F (2d) 524, 39 Am Bankr Rep (NS) 337. *In these unique circumstances I think that reversal of the judgment is justified by our broad power to make such disposition of the case as justice requires.*" (Emphasis ours)

In the instant case:

(a) The petitioners failed, during the entire period of redemption fixed, to take any action to redeem the real estate;

(b) The petitioners failed, during the entire period of redemption fixed, to ask for or attempt in any manner to procure a stay or extension of the period of redemption;

(c) The petitioners themselves appealed from the order fixing the valuation and period of redemption, which appeal was not disposed of until October 9, 1942, four months and twelve days after expiration of the period of redemption fixed.

(d) No supersedeas bond was given or injunction entered in connection with respondent's appeal from the order fixing the valuation and period of redemption so as to stay the petitioners' redemptive rights under the order of May 27, 1941.

(e) The petitioners failed to ask this court to review the appellate court's ruling of October 9, 1942 in which it was held that the fixed redemption period expired while the petitioners' and respondent's appeals were pending (Meshberger v. The Federal Land Bank of Louisville and The Federal Land Bank of Louisville v. Meshberger, 131 F. (2d) 287 (Record, pages 57-58).

(f) No petition to redeem was filed by the petitioners until December 8, 1942 (Record, pages 59-62), no petition for an extension of time within which to redeem was filed until January 23, 1943 (Record, page 70), and no payment of the valuation was

made into court until March 17, 1943 (Record, page 94), more than nine months after expiration of the redemption period fixed and more than five months after disposition of the petitioners' and respondent's appeals by the Circuit Court of Appeals.

The instant case is not one where the petitioners' acting with due diligence, in good faith and in reliance upon a recognized mode of procedure, mistakenly adopted an irregular procedure, later held erroneous. The petitioners in this case having failed to take any action to exercise their redemptive rights or apply for an extension of the period of redemption until after their right of redemption expired on May 27, 1942, and having failed to appeal from the October 9, 1942 order of the appellate court, now seek to avoid the consequences of their dilatory conduct through an unjustifiable appeal to the extraordinary powers of this court.

4. The petitioners' petition and brief raises and argues the questions of application on the fixed value of the national farm loan association stock and balance of rent held by the court after payment of taxes. Those questions are not issues unless it is held that the petitioners' right of redemption was in existence at the time they filed petition to redeem on December 8, 1942 (Record, page 59). If entitled to redeem at the time the deposit was made on March 17, 1943 (Record, page 94) we submit that the petitioners' waived application of the claimed credits by paying the fixed value of $6,000.00 into court.

It was not necessary for the appellate court to adjudicate as to the claimed credits for the reason it held that the fixed redemption period expired during the pendency of the petitioners' and the respondent's appeals, and there

was no review asked or appeal taken from the order affirming the respondent's appeal, whereupon the case was back in the district court for appointment of a trustee and entry of order of sale.

CONCLUSION.

The substantive law and rules of procedure laid down by this Court in construing the applicable provision of Section 75 (s) having been complied with by the District Court and its ruling affirmed by the Circuit Court of Appeals, the petitioners having permitted the fixed redemption period to expire before attempting to redeem or obtain an extension of time to do so and their failure to seek review, within the time fixed for that purpose, of the Appellate Court's order adjudicating that the fixed redemption period expired while the former appeals were pending, convince us of the lack of merit in their petition and brief.

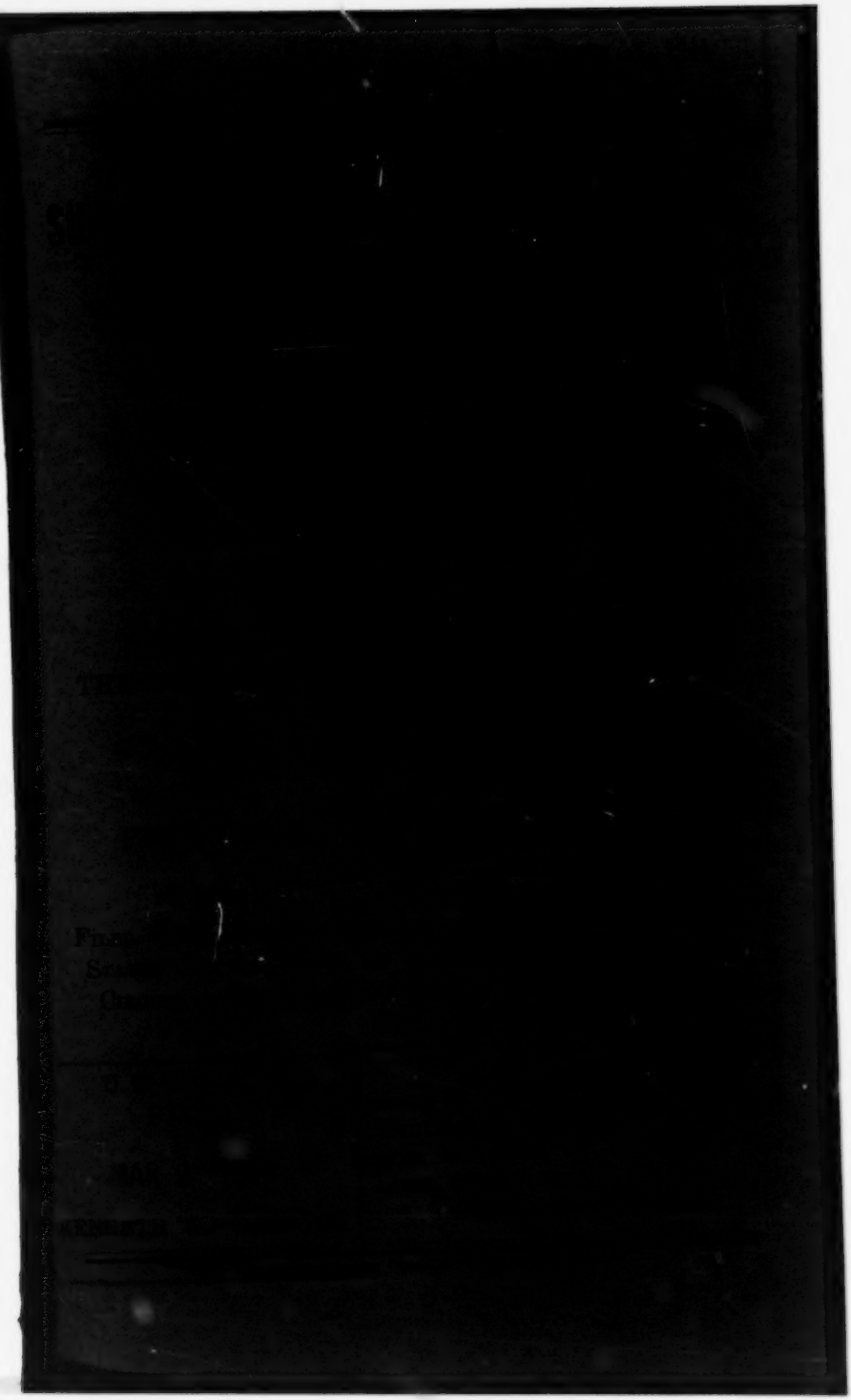
WHEREFORE, the respondent prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

WILLIAM C. GOODWYN
THEO. W. BATES
E. H. ROMER
224 E. Broadway,
Louisville, Kentucky,
Attorneys for The Federal Land Bank of Louisville

A copy of this reply and brief has been furnished to Elmer McClain, Lima, Ohio, and Samuel E. Cook, Huntington, Indiana, Attorneys for the petitioners, this March 31, 1944.

E. H. ROMER.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

RUFUS MESHBERGER AND LELIA B. MESHBERGER, Husband and Wife,
Debtors,

vs.

THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY,
Respondent.

No. ———

PETITIONERS' ASSIGNMENT OF ERRORS

FILED WITH DEBTORS' PETITION FOR APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES

DEBTORS' ASSIGNMENT OF ERRORS

(Necessarily there will be some repetition in stating the errors on appeal to the Supreme Court.)

1. Come now the Petitioners in the above entitled cause and file with their petition to appeal, as of right, the following assignment of errors upon which they will rely in presenting the appeal petitioned for in the above cause, from the judgment of said Court of Appeals entered December 2, 1943, to the Supreme Court to review said errors, namely:

(1) The Court of Appeals erred in refusing to allow the petitioners to redeem the real estate herein at its appraised value of $6,000.00.

(2) The Court erred in approving and affirming the judgment of Judge Duffy below entered December 2, 1943.

(3) The Court erred in holding that the Debtors should have paid the $6,000.00 into Court prior to May 27, 1942.

(4) The Court erred in holding that the one year period to redeem began to run against them on May 27, 1941, and ended on May 27, 1942.

(5) The Court erred in holding that said redemption money of $6,000.00 could not be paid into Court within one year, after October 9, 1942, and also erred in holding that in paying it in on March 19, 1943, was not in time.

(6) The Court erred in not holding that within 30 days after July 10, 1941, when said judgment of $6,000.00, rendered May 27, 1941, was approved, said Respondent attacked said judgment by appealing from it to said Circuit Court of Appeals on the ground that said valuation was too low. The record shows it filed an assignment of error and a Brief of 15 pages. (R. 107 to 122.) That the Supreme Court in the Bronson case has specifically decided that this action of the Respondent stayed the execution of said judgment and amounted to a supersedeas until the appeal was decided, which was not until October 9, 1942. What was it appealing for? It follows, that if the Respondent could not enforce said judgment during said appeal it was therefore, dormant during said period and said Respondent could not afterwards claim it was not stayed. The Court erred in not following said decision of the Supreme Court and in not holding that said period

of redemption did not begin to run until October 9, 1942. It turned out that the Court of Appeals held the Respondent was wrong in so appealing. It is a maxim that no one will be allowed to take advantage of its own wrong.

(7) The Court erred in not holding that the Petitioners had the right to pay said $6,000.00 into Court within the year beginning October 9, 1942. That said sum was so paid March 19, 1943, within said year and the Court erred in refusing to allow them to redeem at said sum and in refusing to turn over "full possession and title" of said land to said Petitioners "free and clear" of all incumbrances. Said $6,000.00 having been paid into Court in time that it gave the Petitioners the right to redeem and the Court erred in not allowing them to redeem. The Creditor could not be allowed to blow hot and cold. It could not appeal and stop the execution of its judgment and at the same time have it running.

(8) The Court erred in affirming the judgment of the District Court, in ordering the real estate sold at public auction and in giving the Creditor the right to make an unrestricted bid on said real estate and also in giving it the right to bid the amount of its debt and the right to bid the $450.00 of National Farm Loan Association stock and to also receive the $843.00 of rent.

(9) The Court erred in not deducting from the debt said $450.00 and the rent in the hands of the Conciliation Commissioner of Adams County in the sum of $843.00 as a credit in favor of the Debtors on said Creditor's debt.

(10) That the evidence showed that said Creditor had kept out and did not pay to the Debtors said $450.00 in making said loan but kept the same and hence were indebted to them for the same—and the Court erred in requiring the Debtors to pay the $450.00.

(11) The Court erred in approving the judgment below, appointing Harley Somers Trustee and ordering him to sell the real estate herein at public sale and in ordering the sale of said $450.00 stock of said National Farm Loan Association. Said Creditors owed said $450.00 to the Debtors. They do not owe it a penny on said stock transaction.

(12) That the Court erred in not ordering said stock deducted from said appraised value. The Creditor had agree to allow it as such credit in final settlement of said mortgage debt.

(13) That said Court erred in allowing said Creditor to bid the whole amount of its dead debt and said stock at the sale of said real estate which would require said Debtors to pay over $12,000.00 for $6,000.00 worth of land. That would make redemption impossible and would defeat the purpose of Congress in enacting said remedial legislation.

(14) That the Court erred in ordering said Conciliation Commissioner to pay the balance of the rent in the sum of $843.00 in his hands to said Creditor. There is no law that it should collect more than the appraised value of $6,000.00. The Court had no power to require them to pay a penny more.

(15) That the Court erred in not finding as a fact that said Debtors had a commitment from a responsible bank that it would furnish money to the extent of $6,000.00, if needed, to refinance said debt and enable said Debtors to redeem their home. The Court had no power to refuse to allow them to redeem. That hence said Court should have granted said petition to redeem and erred in not so doing. That it also erred in not stating that as said $6,000.00 was paid in to Court it would turn over said

land to them "free and clear" of said mortgage debt and all other liens against said real estate. That the Court erred in not noting that said promise was made good by paying said sum of $6,000.00 into Court on March 19, 1943, and that then said Court erred in not making the above entry and in not turning said land over to them. That said $6,000.00 is still in the registry of said Court. It would not have been error to do that to save said home. It was its duty to do that to carry out the purpose of Congress in enacting said law to save American Farm Homes.

(16) The Court had no power to allow any of the reasons it set out in its opinion, to stand in the way of allowing said Debtors to redeem said land at said $6,000.00. They had the savings of a life time invested in said land, and said Court was a Court of Conscience.

(17) In making said order for the sale of said real estate at public auction said Court greatly erred in giving said Creditor the right to bid its whole dead debt including said $450.00, at said proposed sale which amounts to over $12,000.00 and which makes redemption utterly impossible in requiring them to pay $12,000.00 for $6,000.00 worth of land. The Court erred in not refusing said Creditor's petition to allow it to bid said whole debt at said sale, and it erred in not providing that after said sale, (in all cases there is no sale in reality but the Creditor simply bids in the land itself) the Debtors should still have been given a right to redeem said land within the 90 days at said $6,000.00. No money passes. Only a form. That would have been right between man and man and the American way.

(18) The Court erred in overlooking the decision of the Supreme Court of the United States in Wright v.

Union Central (December 9, 1940), 311 U. S. 273 in which it expressly held that:

> "Safeguards were provided to protect the *rights of* secured Creditors *throughout the proceedings*, to the extent of the value of the property." (Citing two recent decisions of the Supreme Court—Bartel's case, 308 U. S. 186, also the Borchard, 310 U. S. 317—in support of that statement of the law.) If that is not the law then there is no law on that point. (Italics ours.)
>
> To leave no doubt about it the Court added the following: "There is no constitutional claim of the Creditor to more than that." (Capital ours.)
>
> Then the Court was not satisfied that that should be taken as "Supreme Law of the land" and it went still further to remove all possible doubt and added:
>
> "And so long as that right is protected the Creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the Debtor."

(19) The Court meant that the Debtors must be given the benefit of the doubt. The Court here did not follow that rule. It resolved the doubts against the Debtors.

Still the Court seemed to want to make it so clear "That he who runs may read" and added another admonition in "Letters of Gold" thus:

> "Rather, the act must be liberally construed to give the Debtor the FULL MEASURE of the relief AFFORDED by Congress." (Capitals ours.) Citing the recent Bartel's case and the Kalb case in support of the statement. That is as plain as the "Sermon on the Mount."

That rule applies to the Debtors' present petition to redeem at the appraised value. That great Court must have thought that some lawyer might claim it only ap-

plied in the first redemption and did not apply in case of a public sale of the land and it stated as follows:

> "Safeguards were provided to protect the rights of secured Creditors, 'THROUGHOUT THE PROCEEDINGS,'" (311 U. S. 273). (Capitals ours.)

That means this rule applies at the beginning and in the middle and at the ending—whenever the question of redemption came up. In other words the Court meant that the rule of the appraised value was not restricted but applied in all of its vigor—all of the time, from the beginning to the end. How does that rule comport with the action of the Court herein? It has ordered a public sale of the land at public auction and allowed the Creditor to bid over $12,000.00 and has required the Debtors to pay that great sum for naked, unimproved land, as shown by the record worth only $6,000.00. The Court meant the Creditor never should be allowed to collect a penny more than the value of the land. The conscience is shocked that the Court should order that they should pay any more. The Court overlooked that the Supreme Court in said Wright case also held:

> "This act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales, and an oppressive burden of debt." This debt was a millstone about their necks, and instead of the Court lifting that burden it has added on another. If this decision stands the Creditor will take their land from them and deprive them of the benefits of this remedial act, and instead of saving their home it is used to lose it.

(20) Why do the Debtors make that claim here? An examination of the opinion of the Supreme Court in Wright v. Union Central (December 9, 1940), 311 U. S. 273, will show that the members of that Great Court di-

vided on that point. It appears that the minority of the judges held that the Creditor did not have the privilege "To purchase at the sale and to receive credit for the indebtedness—in satisfaction of the purchase price." But it appears, the majority of the judges held the contrary. That makes the latter the law in that case only until modified by that Court. Subsequent litigants have the right to question it, in later cases. The Debtors ask this Court and will ask the Supreme Court to reconsider that point and to modify it and rewrite the law so as to allow the Debtors to redeem after said land is bid in (not purchased in reality) by the Creditors, to still allow the Debtors to redeem at the appraised value. In bidding in the land it is not an innocent purchaser and has no right in a Court of Conscience to collect a penny more than the value of the land. The present plan allows the Creditor to bid its dead debt and thereby defeat redemption and the purpose of the Acts to save American Farm Homes. It is only a half remedy now. It should be made a whole remedy.

(21) That the Court erred in overlooking that in the Debtors' petition to redeem at $6,000.00 filed in said cause on December 8, 1942 it raised a new and additional question which had not been presented before in said proceedings namely: To the effect that said Creditor in closing the loan of $9,000.00 herein had kept out five per cent or $450.00 of the money and thereby owed said sum to them and that it agreed said sum should be deducted from said mortgage debt on final settlement. That the Debtors had paid rent for said land to the Conciliation Commissioner of Adams County for over seven years. That it is shown by the Record that after deducting taxes on said land from said rent there still remained in his hands the sum of over $843.00. That they prayed the Court to allow

said sums as a credit and be deducted from said $6,000.00. (This was refused.) The important point about this is in this: Said Creditor on December 21, 1942, appeared by Counsel to said Debtors' petition to redeem and first moved the Court to strike out said Debtors' claims on the ground that said sum of $450.00 was not a liability of said Creditor or that it did not owe it and also that said rent of $843.00 should not be credited on said debt but be ordered paid to said Bank. That action of the Creditor was not all: It also appeared to said Debtors' petition to redeem and filed an answer thereto in which it in effect filed a cross-action against said Debtors in which it affirmatively demanded an allowance or judgment in effect against said Debtors for said $450.00, and said rent of $843.00 and that the Debtors' claim for the $450.00 be denied and that said rent should be paid to the Creditor and the final order and judgment herein of February 24, 1943, from which this appeal was taken followed said answer in this: That it refused to allow said $450.00 to the Debtors and did not allow it as a credit and also refused to deduct it from said debt. That as to said balance of $843.00 of rent the Court ordered that turned over to said Creditor. Strange to say—it cited nothing in the Bankruptcy Act nor any decision of any Court, State or Federal, in support of the latter order.

(22) What does all this mean? It means that the Creditor ventured too far. In trying to get its own claim it gave the Court jurisdiction to allow the Debtors to redeem at $6,000.00. In setting up its claim for the $450.00 and the rent and in denying the Debtors' right to have it applied as a credit on the debt and in demanding an allowance and judgment for them it thereby admitted the jurisdiction of the Court as to its own claim and it follows it could not admit the jurisdiction as to its own claim in

one breath and in the next deny the same jurisdiction to the other part of the petition, namely: The demand of the Debtors to redeem the land at $6,000.00. That was in the petition.

That admission brought a new case before the Court and also a new question about the rent and the $450.00 which had not been presented or adjudicated prior to the last final judgment. The law will not allow a litigant to split a case up into parts, and admit the jurisdiction as to its own part and deny it as to its opponent's part. If the Court has jurisdiction as to one part of a case that gives it jurisdiction of every other part of it. In other words to the whole case.

Even though this happened after May 27, 1942, the Creditor by its own action had extended the period of redemption to February 24, 1943, the date the final judgment was entered. As a result of the action of the Creditor the Court had as much power to allow redemption on the above date as it had to allow the Creditor the $450.00 and the $843.00 of rent. The Creditor overreached itself. It follows the Court had jurisdiction to allow redemption and erred in not allowing it."

(23) The Court erred in not reversing said judgment because of the admission of said Respondent in its argument in its Brief in the Court of Appeals in said first appeal from said $6,000.00 to said Court it stated as follows:

> "The Appellant [The Federal Lank Bank] does not contend that the Debtors' right to redeem at the end of three years is absolutely foreclosed at midnight on the third anniversary. Clearly, this is an equitable action, and where the Debtor is able to redeem at the fixed valuation, the Court has in its discretion, the

right to permit the payment of the redemption price." (R. 115.) (Brackets our own.)

The Court again overlooked that the Creditor made an admission as follows:

"(h) On October 13, 1942, 5 days after the decision of the Court, Counsel for the Creditor mailed to Counsel for the Debtors, a motion which it had prepared and filed in the Circuit Court of Appeals with proof of service. By some oversight, said Counsel did not have it filed in the District Court and request the Clerk to include it in the transcript. Hence, it is not in the record. If the Creditor disputes this, the Debtors will ask the Court of Appeals to order it made a part of the record. For the sake of brevity we omit the notice and proof of service and insert only the motion as follows:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

In the Matter of Rufus Meshberger, et al., *Debtor,* Federal Land Bank of Louisville, *Appellant,* vs. Rufus Meshberger and Lelia B. Meshberger, *Appellees.*	No. 7871

MOTION OF APPELLANT TO REMAND CAUSE

Comes the Federal Land Bank of Louisville, and moves the Court to remand this cause to the United States District Court of the Northern District of Indiana, Fort

Wayne Division, for immediate entry of order of sale with leave to hold its place on the docket of this Court, for determination of (1) the reasonableness of the time allowed prior to sale to redeem, and (2) the reasonableness of the market value of the farm in question in the event the lower court refuses to order a sale of said property, the one year period of redemption having expired on May 27, 1942, and redemption not having been made.

(Signed) Theo. W. Bates,
(Signed) J. F. Williamson,
Attorneys for Federal Land Bank of Louisville."

(Appellants' Brief, pp. 30 & 31.)

This statement admits, the question was open as to "determination of (1) reasonableness of the time allowed prior to sale to redeem." The Creditor admits in its brief filed in said appeal that it sent this statement: It said:

> "The making of the motion cannot be considered an admission of record that the time to redeem is not settled but still an open question." (Debtor-Bankrupts' Brief, page 32.)
>
> (Appellee's Brief, R., p. 51.)

(24) This is an admission that there is no hard and fast rule, as to when the money is paid in. The only important thing is that the Debtor is able to redeem. The record shows the Debtor had a Commitment on December 8, 1942, but the trial Court did not notice it in the order.

It is the Rule that the Debtor cannot make the trial Court notice or consider a question raised. All they can do is to properly raise the question. If the Court ignores it, it is a ruling or finding against the Debtors and it gives them the right to assign it as error against them.

(25) The Court overlooked that Judge Duffy had the power to allow the Debtors to redeem notwithstanding the previous judgment of May 27, 1941. The Debtors' petition filed December 8, 1942, to redeem the land at its appraised value was the equivalent of a motion to vacate or set it aside. The Creditor did not plead res judicata and thereby waived such a motion to vacate. (R. 62-63.)

Instead of raising res judicata it pleaded that the $6,000.00 was not paid in within one year from May 27, 1941. We have shown by the decision of the Supreme Court in the Bronson case above that it was no answer at all. (R. 62.) Then it evaded the question again by asserting no stay bond was given (R. 62 (a)). The Supreme Court in the Bronson case said none was required; that the Creditor's appeal was a stay or supersedeas. Then it evaded it again (R. 62 (b)) by claiming the Commitment was not good because it was not paid in within one year after May 27, 1941. There again it is headed off by the ruling in the Bronson case that its appeal was a supersedeas and that the money did not need to be paid in until one year after October 9, 1942, when the Court of Appeals disposed of the appeal by affirming the judgment below. (R. 63.)

(26) Then it blundered again as to the $450.00 of stock by claiming it was entitled to a judgment against the Debtors for that. That was bringing in a new case and had the effect of setting the former judgment aside, or a motion to vacate it and try a new case as to the stock and as to the $843.00 of rent which it claimed. In bringing the new case it waived the question of res judicata.

(27) It could not claim the latter and at the same time bring in that which was a cross-action on the stock and rent. The rest of its answer never mentioned res judi-

cata but was on the merits to recover the $450.00 and $843.00. (R. 63-64-65.) If res judicata applied, then the Court had no jurisdiction. It waived both by demanding a judgment against the Debtors for the stock and rent. In place of that it abandoned the first judgment and consented that the Court had jurisdiction of the new cause of action. It shifted its position and lost its right to plead res judicata. (12 American & English Encyc. of Law.) (Old Ed. 299—Many Cases Cited.)

If the jurisdiction existed as to this new cross-action, it also existed as to the whole case and hence included the power of the Court to reconsider the right to redeem at $6,000.00. The Creditor could not open the door and have its cross-action adjudicated and close it as against the right to reconsider redemption.

(28) The Court erred in overlooking that Judge Duffy had the inherent power to reconsider and set aside the previous order of May 17, 1941, on another well-established principle of law. In the Creditor's Brief filed in its appeal from the above judgment of the District Court to the Court of Appeals, on page 12 it made the following important admission. It cited Kimm v. Cox, 130 F. (2d) 721 the Court of Appeals of the Eighth Circuit on September 8, 1942, the Court stated as follows:

> "First . . . Since a bankruptcy proceeding, from the filing of the petition to the final settlement of the estate, is but one continuous suit, and since the bankruptcy court is always open and has no terms, any order of the court may be re-examined and vacated within such pendency *unless such vacation would disturb rights which have become vested in reliance upon such order or action.*" (Italics ours.)
>
> (Appellant's Brief, p. 12.)

(29) We have shown above that the action of the Creditor in bringing in a new cross-action as to the stock and rent made it wholly unnecessary for any one to file a formal motion to vacate the former judgment. To contend otherwise would be absurd. The above rule applies here:

> "(i) This means the rights of third persons. It would not cover any rights of the Creditor to a public sale. It never had such a right as that as against the Debtors right to redeem at the appraised value.
>
> We cite on this point: 1 Remington Sec. 502, pp. 621-622.
>
> "(j) This author cites the Ives case, 113 Fed. 911 which covers the whole point.
>
> "(k) We call attention to the following decisions of the Federal Supreme Court which applies here: 'A Federal District Court has power to set aside its order dismissing a petition for reorganization of a corporation under 77 B of the Bankruptcy Act and to rehear the cause, notwithstanding the period allowed by the Act for appeal from the order, has expired.'"
>
> Wayne v. Owens, Illinois, 300 U. S. 131.

(l) If the hands of a Federal District Court "were tied" it could not carry out this Act of Congress or administer the law in the many Bankruptcy cases coming before it. It has many inherent powers, one of which is to modify a previous order in bankruptcy at any time before the rights of third persons have intervened. The proceedings are one continuous case. It would not be a Court of Equity if it did not have such powers.

(Appellees' Brief, p. 16.)

(30) If these cases mean anything it is that the doctrine of res judicata does not apply to the usual orders made in a bankruptcy proceeding and it does not apply to the judgment and order of May 27, 1941. Counsel is

aware that some of the Courts of Appeals have gone wrong on this doctrine but this Court should set them aright and adhere to the above holdings of Remington and the Ives case. (113 F. 911 and of this Court in Wayne v. Owens, 300 U. S. 131.)

(31) I have just examined Rose's Notes on the Bronson case. The latter is in good standing. The Notes cite 131 F. 430. I quote as follows:

> "In First National Bank, et al. v. State National, etc., 131 Fed. Reporter P. 430, May 2, 1904, the Court said: 'The precise point here raised has not been discussed in the National Courts, because the practice adopted by Appellant in the case is virtually unknown; but it has been incidently referred to in several decisions to the effect that the decree in the District or Circuit Court, when an appeal is taken therefrom, is suspended until the appeal is disposed of. This rule is frequently stated in Admiralty and other causes.' Court cites 6 Wheat. 194, 203—5 L. Ed. 239—also cites the Bronson case—22 L. Ed. 251—22 L. Ed. 259—26 L. Ed. 1065—27 L. Ed. 732 and 27 L. Ed. 888."

Then the Court in this case, 131 F. 430-(431), quotes from the opinion in the Bronson case: "In Bronson v. Railroad Co. supra the Court said: "They having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it pending the appeal. They assert the decree is founded in error, and for that reason should not be executed, but should be reversed and corrected in the Appellate Tribunal. The Appeal suspends the execution of the decree." (P. 431.) In Emsinger v. Powers cited above the Court said, "White the appeal was pending here, although there was no supersedeas, the Circuit Court had no jurisdiction to vacate the decree in pursuance of the prayer of a bill of review, be-

cause such relief was beyond its control." (Bronson case cited 13 So. 920-21) (131 F. 432).

The Bronson case is cited with approval in U. S. v. Cling Dong Ying, 229 F. 813 (816).

All of the decisions cited in Rose's Notes upholds the Bronson case as the law—that the action of a party in appealing a case amounts to a supersedeas and that judgment cannot be executed while the appeal is pending. If that be true it is dormant and does not run against the Debtor until the appeal is settled.

That hence, the Court of Appeals erred in not following the Appeals of the greatest Court in the Land and adhered to the Supreme Law of the Land and have reversed the lower Court and allowed the Debtors to redeem their Home at its appraised value.

Respectfully submitted,

RUFUS MESHBERGER,
LELIA B. MESHBERGER,
Husband and Wife.

Subscribed and sworn to by Rufus Meshberger before me this 9th day of February, 1944.

SAMUEL E. COOK,
Notary Public.

My commission expires April 7, 1947.

SAMUEL E. COOK,
Huntington, Indiana,
ELMER MCCLAIN,
Lima, Ohio,
Counsel for Debtors.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

No. 423

RUFUS MEADOWCROFT AND LECLA B. MEADOWCROFT,
Husband and Wife,
Petitioners,

vs.

THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY,
Respondent.

SECOND PARAGRAPH

Petitions for Appeal from United States Circuit Court of Appeals for the Seventh Circuit to the Supreme Court of the United States

FILED
MAR 8 - 1946
CHARLES ELMORE CROPLEY
CLERK

Robert E. Cox,
Rushville, Indiana;
Frank McClain,
Lima, Ohio,
Counsel for Petitioners.

Gibson Publishing Co., Indianapolis, Ind.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. ——— IN BANKRUPTCY

RUFUS MESHBERGER AND LELIA B. MESHBERGER, Husband and Wife,
Petitioners-Debtors,

vs.

THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY,
Respondent-Creditor.

No. ———

SECOND PARAGRAPH

DEBTORS' PETITION TO APPEAL, AS OF RIGHT, FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE HARLAN FISKE STONE, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. PRELIMINARY

(1) Come now the Petitioners in the above cause and file their Second Paragraph of petition for and hereby appeal, as of right, to review the judgment of the United

States Circuit Court of Appeals for the Seventh Circuit entered December 2, 1942, to the Supreme Court of the United States. (The petition for a rehearing was denied by said Court on January 3, 1944.) Said petition respectfully shows that said appeal is based upon the following grounds:

(2) That said cause in said Court of Appeals was a proceedings in Bankruptcy under Section 75 of the Act of March 3, 1933, and its amendment by adding Sub-section (a) August 28, 1935, on the Subject of Agricultural Compositions and Extensions, which had originated in the District Court of the United States for the Northern District of Indiana, Fort Wayne Division, and appealed to said Circuit Court of Appeals. (11 U. S. C. A. 203-(s).)

(3) It is conceded by the authorities that the Statute or the Rules do not provide any particular form for said petition. However, the law favors the right of appeal. (2 R. C. L., p. 100.)

(4) This appeal being only a proceedings for review, it follows that the petition therefor would have to show that the questions sought to be reviewed were properly raised in the trial Court below. In addition to this the Petitioners would have to establish facts showing it had a good cause which entitled it to relief, i. e. That the Petitioners at this moment are entitled to redeem their home at the $6,000.00 which they have paid into Court for that purpose. It can not be disputed but that the Petitioners have the right to present the above. It will follow that theory in preparing this petition for this appeal.

(5) Hence, this is a real live law suit to save an American Farm Home, and it follows there is Justice and Equity in this appeal. This Court in the Wright case December

9, 1940, described the above Acts of 1933 and 1935 as follows:

> "This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt."

(6) It may be suggested that the farmers are not distressed now. Suppose they are not. But go back to 1933 and 1935, and their condition was such that the papers were full of notices of sheriff's sales of farm land and thousands of them would have lost their homes had Congress not enacted this remedial legislation. Even with this legislation, in some Counties in Indiana, 20 per cent of the land owners have lost their homes.

(7) Then the bitter fight made by the Loan Companies in the Courts against this legislation cost thousands of farm homes. The case at bar is one that came up when farmers could not make enough to pay the taxes on their land, and it is still pending. The books are full of cases where the Inferior Federal Courts had refused to give the "distressed farmers" the benefits of these Acts. How unreasonable. They held that the Acts were unconstitutional, that Congress had no power to enact a law extending the period to redeem for three years, that the Debtors had not filed their petitions in good faith and that there was no reasonable hope that they could ever rehabilitate themselves within the three-year period and other technical objections which threw the "distressed farmers" out of Court and caused them to lose their homes.

(8) Not wishing to find any fault with Congress—(It is blamed for everything which goes wrong), but it had not provided any way to obtain the money with which to redeem. For without the aid of Congress they were as

helpless as a child. That prior to the commitment set out in this cause and on March 19, 1943, when they paid the $6,000.00 into Court, it was impossible to procure a farm loan from the Banks or Loan Companies. These "distressed farmers" found themselves between two millstones. True, they had a law and decision of the Supreme Court in the Wright case which allowed them to redeem their home at its appraised value of $6,000.00, but their Government had not provided a way to get the money with which to pay the appraised value. Without that the law was largely a "dead letter" until land went up and the Banks began to open their doors for farm loans. Hence, the Petitioners struggled along (but many gave up the ghost) rather than resort to litigation in distant Federal Courts.

II. BEGINNING OF THIS APPEAL

(1) On May 27, 1941, the Conciliation Commissioner to whom the case had been referred heard the evidence as to the value of the land and fixed it at $6,000.00 and gave the Debtors one year in which to redeem. (R. 30-32.)

(2) Something happened which changed the whole situation. The Record shows that on August 7, 1941, said Creditor attacked the above judgment and tried to overthrow it by appealing from the District Court to the Circuit Court of Appeals. It filed with its petition for appeal its assignment of errors or contested issues and a 15-page Brief (R. 107-122), and based its appeal on two grounds. That the one year to redeem was too long and the valuation of $6,000.00 was too low and that it should have been from $7,800.00 to $8,400.00 (R. 110) (R. 121). The Creditor also filed a Brief of 15 pages in the Court of Appeals attacking this valuation of $6,000.00 as too low. This was an attack on said judgment. It could not so attack it and

in the next breath claim it was in force and running against the Debtors. The Petitioners will show that the Supreme Court has held that said action of the Creditor in so appealing and trying to overthrow said judgment amounted to a supersedeas and that said time did not run until said appeal was ended on October 9, 1942, by the Court of Appeals affirming the judgment below. (R. 55.) It will be shown that this question was properly raised below.

(3) The decision of the Court of Appeals affirming the $6,000.00 judgment brought the case back to the District Court.

(4) The next proceedings was the Debtors' petition to redeem the land at $6,000.00. This was filed on December 8, 1942, within the year from October 9, 1942. In said petition said Debtors asked (1) to redeem said real estate at said appraisal of $6,000.00. (2) That the Debtors had the Commitment of a responsible Bank that it would furnish money to refinance said debt to the extent of $6,000.00. (3) That said Debtors own stock of the Wells County Federal Farm Loan Association and that said Creditor retained the sum of $450.00 and gave said stock for it. That it is provided in said stock that it should be deducted from said debt on final settlement. (R. 60-61). (4) That said rent ($843.00) should be deducted from said debt. (R. 61.) It will be noted that said stock and taxes were not brought into said first hearing and judgment. These issues were not litigated in the previous cause and judgment.

The Creditor moved to strike out said petition, demanded the rent ($843.00) above the taxes. (R. 62-63.)

The Debtors also filed supplemental petitions (Paragraphs 1 and 2.) (R. 66-71.)

The Creditor filed an answer which should be treated as a cross-action against said Debtors for said stock and that said rent be paid to said Creditor. (R. 63-65.)

(5) This action of the Creditor brought a new issue into the case, including the Debtors right to redeem. It thereby asked the Court to try the question as to the stock and $843.00 for rent which was in fact a cross-action against the Debtors, to recover a judgment against them and in its own favor, for $450.00 and $843.00. The authorities all hold that it thereby invoked the jurisdiction of the Court for all purposes. When a Court has jurisdiction of a part of a case that gives it jurisdiction over all of it. It thereby consented to the jurisdiction of the Court to hear and determine its cause, and when it consented to that for its own benefit, it is elementary that it could not deny the jurisdiction to redeem their land. This action of the Creditor set aside the $6,000.00 judgment. It is settled that a litigant can not open a door in its own behalf and profit thereby and then close it in the face of its opponent. This gave the Debtors the right to have the Court reconsider their right to redeem. The cases will be set out in the assignment of errors herein.

(6) The Debtors' petition was referred to Hon. F. Ryan Duffy for trial and was heard on January 29, 1943, and judgment entered on February 24, 1943. The Court did not seem to realize that he was considering a Bankruptcy case. He did not give the Act a liberal construction but a narrow technical one. The Court should have construed all of these questions in favor of redemption, as this Court stated: "Rather the Act must be liberally constructed to give the Debtor the FULL MEASURE of RELIEF afforded by Congress." Of what avail was it for Congress to enact these remedial laws and for this Great Court to admonish the Inferior Federal Courts to let noth-

ing stand in the way of allowing redemption, if these lower Courts refuse to enforce them? A law is a "dead letter" if not enforced.

(7) The Court paid no attention to the fact that the Debtors showed they had a commitment of a responsible Bank to refinance the loan to the extent of $6,000.00.

It denied the petition to redeem the real estate and ordered the Trustee to sell the land and the $450.00 worth of stock and allowed the Creditor to bid its debt at the sale. This meant it would bid its dead debt and get the price up to over $9,000.00, and make it impossible for the Debtors to pay $9,000.00 for $6,000.00 worth of land. Hence, the giving the Debtors 90 days to redeem amounted to nothing to the Debtors and meant that the Debtors would lose the land and it would be handed over to the Creditor. (Order in full, R. 74-76.) Oh, why should not a Court of Conscience see through such an unjust plan as that.

(8) The action of the Creditor in bringing into the case the new cause of action to recover the $450.00 and have the $843.00 of rent turned over to it reopened the above order and judgment and modified the same. This was the first time said items were made issues. This action amounted to a consent of the Creditor to give the Court further jurisdiction to reopen the judgment and hear said items, and also gave the Court jurisdiction to reconsider every part of the case and to allow the Debtors to redeem. The cases will be cited in the assignment of errors.

(9) From this modified Duffy judgment the Debtors appealed to the United States Court of Appeals on February 24, 1943. (R. 78.)

The notice of Appeal of said cause is found in the (Record 78-82). The Debtors made and filed its state-

ments of points of law and assignment of errors in substance as follows: This raised said questions and shows the errors of the Court.

The Court erred in denying the Debtors' Petition to allow them to redeem at its appraised value—$6,000.00.

That that part of the judgment of May 27, 1941, did not begin to run until Creditors' appeal was disposed of on October 9, 1942, and that the Court erred in holding it began May 27, 1941. That it erred in refusing to allow the stock credited on the debt and in not holding that said Creditor was indebted to them for the same. That the Creditor had no claim above said appraisal of $6,000.00 and in allowing it to bid its whole debt of $9,000.00 and thereby required the Debtors to pay $9,000.00 for $6,000.00 worth of land.[1] That the Court erred in ordering the rent money paid over to said Creditor and in not holding that said rent should have been credited on said debt. The Court erred in not finding the action of said Creditor in appealing from said $6,000.00 judgment suspended the execution thereof and the time did not begin to run until October 9, 1942. The Creditor could not seek to overthrow said $6,000.00 judgment and at the same time insist it was in force against the Debtors. The Court erred in not allowing the Debtors to redeem when it appeared they had the promise of a loan by a responsible Bank. The Court erred in not extending the time to redeem. The Court erred in ordering a sale when it was shown a loan was promised to redeem the land. The Court erred in overlooking that forfeitures are odious in Courts of equity and erred in enforcing that when it has been shown there was other ample remedy to extend the time to perfect a promised loan. The Court overlooked that the Supreme Court in

[1] It will not be disputed but that the record shows there is not a single building on the land. And that it will cost $8,000.00 to improve it.

the Bronson case 17 L. Ed. 616 held that the action of the Creditor in attacking the $6,000.00 judgment by a vigorous appeal suspended the execution of said judgment, until said appeal was ended on October 9, 1942. It was absurd for the Creditor to contend that it had the right to appeal and overthrow the $6,000.00 and at the same time require the Debtors to redeem from the judgment it was "turning Heaven and Earth" to overthrow. The Court erred in not following the decision of this Court in said Bronson case and the Court erred in denying the right to redeem. The Court erred in not holding that the Creditor by appealing from the judgment waived the right to enforce it until its appeal was decided against it. Because the effect of the Court of Appeals in affirming the $6,000.00 was, that the Creditor must accept the $6,000.00. The questions raised are shown again in the petition for a rehearing, with several additions. Then they are shown again in the assignment of errors attached to this petition as a part of this appeal.

(10) This brings us to the final judgment of the Court of Appeals, December 2, 1943. These points in their order: (a) The Court first calls attention to the long litigation in the case at bar. This opinion will be in the transcript of the proceedings in the Court of Appeals. The Creditor was to blame for that, but the Court does not say so. It leaves the inference the other way. This powerful Financial Institution "Turned Heaven and Earth" to deprive the Debtors of the right to redeem their land at its appraised value. What manner of man or woman would they be who would not fight for their Country or Home? (b) Then they filed their petition to redeem showing that they had a commitment for a loan for the $6,000.00 which was afterwards paid into Court within the year, and that it is still therein and cited a decision of the

Supreme Court which directly held that action of the Creditor in appealing suspended the running of the time until that appeal was settled. But the Court of Appeals tried to overrule that Great Court to deprive the "distressed farmers" of the right to save their land. In such a case the Supreme Court meant in the decision in the Wright case that the Court of Appeals should have allowed them to redeem and required this Great Financial Institution to Appeal. "Actions speak so loud we cannot hear ourselves talk." (c) Then the Court characterized the action of the Debtors in showing they had raised all of the questions below, as "Ancient History," and added it would "omit the ancient history." (d) The next its statement about the Wright case. That statement is not correct. Why did it not state that this same District Court (Judge Slick presiding) had fixed the value of the land at $6,000.00 and then refused to allow the Debtor to redeem at said sum and ordered the land sold at public auction? And it allowed the Creditor to bid its dead debt and made redemption impossible and thereby required the Debtors to pay $9,000.00 or $10,000.00 for $6,000.00 worth of land. Counsel here, appealed to this same Circuit Court of Appeals and it also refused to allow him to redeem and affirmed the decision below. Then Wright appealed to the Supreme Court and it held that he had the right to redeem at the appraised value. Then this Court speaks of "our mandate." The latter in effect came from the action of the Supreme Court in reversing the Court of Appeals. The latter was commanded to do what it did. This great decision liberated the "distressed farmers." (Wright v. Union Central, December 9, 1940, 311 U. S. 273.) (e) This is not all about said Wright case. There was a previous Wright case before this same Court of Appeals. The same District Court (Judge Slick presiding) as here also held

that Congress did not have the power to extend the period of redemption to three years and struck the 200 acres from the schedules and other objections were made to these remedial Acts. The same Wright again appealed to this Court of Appeals for relief. Did it give him relief? No. It decided against him and upheld the action of the District Court and the same Wright appealed again to the Supreme Court which held that Congress had the power to extend the time to redeem to three years and that as to the 200 acres, that it should remain in the schedules and was in Bankruptcy. (f) Then the Court says the redemption period "had expired and the question was moot." Saying a thing is so, does not make it so. The Supreme Court in the Bronson case says in principle the Creditor's appeal suspended the judgment and hence the time to redeem did not begin to run until October 9, 1942, the end of the appeal, and ended in one year from that date. Hence the question was not "moot." Strange that the Court would not follow the decisions of the Supreme Court and the other case cited on this point, but stranger still that it never cited a single case to support any question it noticed. It was the duty of the Court to cite cases in support of its rulings. If there had been any case, it would have been found by opposing Counsel here. If there are none the Court should say it searched and found none. Give us a revival in liberality in the Superior Federal Courts on these remedial Acts of Congress.

(g) Then the Court says the time to redeem ended May 27, 1942 (or July 10, 1942 when the order was approved) and that said order was a final judgment. It was a final judgment when entered but the action of the Creditor in afterwards filing a cross-action to recover the $450.00 of stock and the $843.00 of rent and the action of Judge Duffy in hearing evidence and allowing said

demands changed that judgment and re-opened it. The only final judgment now in this case is the one Judge Duffy entered, February 24, 1943. The present appeal is not taken from the one of May 27, 1941, but the later one, February 24, 1943. This appeal must stand or fall by the latter. These items were not in the first hearing and judgment so when the Creditor itself brought them in this case that amounted to a new case and it could not bring in these new items which had not been litigated in the Judgment of May 27, 1942 and then claim the first judgment was final. It was superseded by the one Judge Duffy entered on February 24, 1943.

(h) Then it makes a strange and ridiculous statement about the Bronson case and the other cases cited on the effect of a party appealing from its own judgment. Bear in mind this $6,000.00 judgment was a judgment prayed for and rendered in favor of the Creditor. It says: "Without analyzing the authorities relied upon by the Debtors, we think it is sufficient to state that we have examined them and they are not in point." The language of the Supreme Court and other decisions was so plain that no "analyzing" was necessary. Why are they not in point? Because we tell you so. An opinion not only decides the questions between the parties but it is also a precedent for the guidance of the Courts and litigants in the days to come. Instead of the Court asserting "the decisions are not in point" why did it not quote the language in the decision of the Supreme Court and leave future Courts and litigants to judge for themselves whether the Courts assertion was sound or not. Let us take the Bronson case and quote what the Supreme Court said was the law on this point of appealing:

> "They (the parties) having appealed from the decree, it would be against all reason and principle to

permit them to proceed in the execution of it pending the appeal. They assert that the decree is founded in error and for that reason should not be executed, but should be reversed and corrected in the Appellate tribunal. The Appeal suspends the execution of the decree."

(Bronson v. LaCross, 1 Wall. 405, 17 L. Ed. U. S. 616).

(i) Let us also quote from 6th Cyc. Fed. Proc. Sec. 2862 page 341:

"Accordingly, one appealing from a decree or judgment in his own favor supersedes it by so appealing and can not execute it." The Author of Cyc. Fed. Procedure cites the Bronson decision.

These two authorities directly contradict the Courts statement.

"Why stand we here idle?" Why tarry any longer? These cases settle the question. The language of these two decisions is as plain as the "Lord's Prayer" or his "Sermon on the Mount." Who would question the meaning of them?

Once on a time there was a Judge of the Supreme Court of our State who would say: "We have examined the instruction questioned here, and find it is a correct statement of the law," but would never set out the instruction.

The Court here must have intended by making the statement that these decisions were "not in point," to foreclose the argument; but it overlooked that this appeal gave the Debtors an opportunity to have the Supreme Court examine this language.

(j) Then the Court repeats the following statement made by Judge Duffy in his order:

> "There is no reason why the sum of $6000.00 could not have been deposited in Court before the expiration of the one year period."[1]

The Supreme Court has given the reason. There was no reason requiring them to pay it within the year ending May 27, 1942.

(k) Honor bright. Why would the Court of Appeals fail to set out the language of the Supreme Court in the Bronson case and the other authorities cited, and make such a statement as that? That made the judgment dormant until its appeal was settled and any one would know that the Debtors did not have to pay the redemption money within the one year from May 27, 1942. The action of the Creditor extended the time to one year from October 9, 1942. The Supreme Court based its decision on solid ground when it said:

> "It would be against all reason and principle to permit them (Appellants) to proceed in the execution of it (judgment) pending the Appeal."

It follows as the "night the day" if the Creditor in this case had tied its hands and could not execute its own judgment while the appeal was pending, it follows that said judgment was not running against the Debtors at the same time. That proposition cannot be overthrown. In other words the $6000.00 judgment was as "Dead as Julius Caesar" from the time the Creditor appealed to the Court of Appeals, until it was affirmed on October 9, 1942. Then it began to run.

(l) It is foolish and absurd to contend that a party could appeal from its own judgment and at the same

[1] That is not the question here. The question is, the law did not require them to pay it in while the Respondent was appealing.

time execute or enforce it. If he could not enforce it, it was not running. Men have not lost their reason.

It was the imperative duty of the Court of Appeals to follow the decisions of the Supreme Court and apply them in this case, and hold as it held when the Creditor appealed from its own judgment, it lost the right to execute it, and when it lost that right to execute it there was no power in the Court below (Duffy order) to bring present life into that judgment and hold it was running at a time when it could not be executed. That hence the Court should have promptly allowed the Debtors to redeem at the $6,000.00 and ordered that said $450.00 and said $843.00 should be credited on said debt. Hence, the Court erred in refusing to allow the Debtors to redeem.

(m) The Court of Appeals in affirming the order of Judge Duffy thereby approve the order allowing the Creditors to bid the whole amount of their claims. This will defeat redemption and the intent of Congress and overrule the Supreme Court's decision in the Wright case, 311 U. S. 273.

> (a) The Supreme Court held in that case the following: "This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt." "Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property." "There is no constitutional claim of the creditor to more than that. And so long as that right is protected the Creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor." "Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by

Congress. (John Hancock Mut. L. Ins. Co. v. Bartels, supra; Kalb v. Feuerstein, 308 U. S. 433, 84 L. ed. 370, 60 S. Ct. 343, 41 Am. Bankr. Rep. (N. S.) 501, supra), lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."

(b) It is clearly shown at the close of said opinion that a minority of the Judges held that the appraised value should prevail during the three year period of redemption in Subsection (s) Paragraph 3, or a less period as allowed here, and also applied where a public sale was ordered after the failure of the Debtors to redeem, and that the Debtors pray this Court to reconsider that ruling and to modify the order of sale herein to the effect that said Creditor shall not raise the price of said land above the present appraisal by bidding their dead debt and that the Debtors may redeem said land at said public sale at $6,000.00 and that it be ordered that the $6,000.00 now in the registry of the District, be applied on said redemption and the Creditor be required to accept said sum as payment in full of its whole debt and to discharge them of the balance above said sum. Hence, the Court of Appeals erred in refusing to allow them to redeem and in denying their petition to so redeem. And also erred in allowing said Creditor to raise the price of said land up to $9000.00 or more and defeat redemption by requiring the Debtors to pay $9000.00 and more for land that was appraised at only $6000.00 and on appeal, on the ground that said sum was too low, this Court of Appeals affirmed said judgment. Hence the Circuit Court of Appeals erred in approving and affirming the erroneous final judgment entered by Judge

Duffy on February 24, 1943—in not reversing said judgment.

III HOW SHALL THIS APPEAL BE TAKEN?

(a) Section 24 (a) of the Chandler Bankruptcy Act of June 22, 1938 (c) or the same section 47 (11 U. S. C. A.) (c) provide the following:

> "(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."
>
> "(c) The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

(b) This Act took the place of the previous provision for a Writ of Error, which was abolished on January 31, 1928. The Act reads as follows:

> "ACT OF JANUARY 31, 1928.
>
> Chapter 14, 45 Stat. 54.
>
> An Act in reference to writs of error.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

SEC. 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: Provided, however, That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts." (U. S. Code 1926 to December 3, 1928—See 861 a & 861 b Revised Rules of the Supreme Court of the United States Appendix Page 10.)

(c) Section 2 of the above Act was amended April 26, 1928 as follows:

"SEC. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and invoking such relief, including the provisions relating to the appeal which the preceding section substitutes for a writ of error."

(d) The old Act as to Writs of Error reads as follows:

"This section prior to its amendment read as follows: 'In all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: Provided, however, That the review of judgments of State

courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts." United States Code Compact Ed. to Dec. 3, 1928, after 861b.

(e) It will not be disputed but that the writ of error to review the proceedings in a Court is of Common Law origin and that it was a writ "as of right." (Revised Rules Supreme Court—Appendix, page 10).

(f) The method of obtaining such a writ set out above is in substance as follows: (a) That they will file the proper number of copies of the petition to appeal in the office of the Clerk of said Court of Appeals. (b) "It shall be taken by serving upon the adverse party or his attorney of record a written notice (citation) and a copy of the printed record herein to the effect that the appellant appeals from the judgment or order of the Court to a higher Court to review said judgment on account of certain errors, setting out said errors to be defended by the defendant in error. And will have a citation issued to be served on said defendant. All of this will be included in the transcript of the proceedings in said Court of Appeals. (c) And also by filing in the office of the Clerk of said Court a formal notice of said appeal. (861 b U. S. Code 1926 to December 3, 1928).

(d) 2 R. C. L. p. 100 gives the following additional information as to a writ of error:

> "* * * it would seem that a petition which gives the name and residence of the opposing party, the County (or Court) in which the judgment was obtained, the term of the Court, the number of the cause on the docket and the judgment asserts (sets out) the errors and requests a citation (under name of President) to issue to the defendant in error to appear

before the reviewing Court at the next term (or any day certain) and defend the writ, is sufficient."

(e) The Petitioners herein will take all of said steps in taking this appeal which is substituted for a writ of error in the above cause.

That the Petitioners say the errors set out above and which will be set out in the assignment of errors filed herewith could have been appealed to the Supreme Court by a petition for a writ of errors, as sued out, under the practice and provisions for such a writ, prior to its abolishment on January 31, 1928.

Wherefore, the Petitioners pray the Supreme Court of the United States to hear and review the errors in the judgment of the United States Circuit Court of Appeals, as set out in the above petition and as set out in the designation of points of law as filed in said Court of Appeals, also as set out in their petition for a rehearing filed in said Court and also as set out in the assignment of errors attached hereto and made a part of this petition for an appeal and to review any other plain errors shown in the records of said cause.

That they will first file said petition in the office of the Clerk of said Court of Appeals and afterwards file the same in the office of the Clerk of the Supreme Court properly certified. That it will ask said Clerk to issue said notice or citation to be served on said defendant in error and will issue a written notice to said clerk that it appeals from said judgment.

That said Petitioners will also file a petition in the office of the Clerk of the Supreme Court praying for a writ of certiorari, directing said Court of Appeals to send the record and proceedings showing the errors in said cause

up to it for review and correction. That they will take all of the other steps required to perfect said petition for a writ, including the filing of the proper number of copies of the printed record and a transcript duly certified of the proceedings in said Court of Appeals and also including a copy of the opinion of the judgment of said Court of Appeals rendered in said cause on December 2, 1943, at the October term 1943 of said Court, and all of the other proceedings in said Court of Appeals. That hence, it will not be necessary for them to file another set of printed copies of the record and of the proceedings in said Court and they will ask said Supreme Court to allow them to use the same record to present this petition for a direct appeal herein as is filed and used in the petition for certiorari.

That it will have the clerk of said Court of Appeals to certify this petition and assignment of errors for appeal and of said other proceedings in said cause in printed form and in proper numbers as required by the Rules of this Court, and they will do everything else necessary to bring all of said errors before this Court for review and correction.

That the Petitioners will file a brief in the Supreme Court in support of this petition and assignment of errors. And pray that this appeal be considered and said errors reviewed and corrected.

That they pray the Court to reverse and set aside said judgment of said Court of Appeals and to grant the Petitioners petition the right to redeem said real estate at said $6000.00. And that the said Respondent take nothing by its answer and cross-action as to said $450.00 stock and $843.00 rent.

That said lower Courts be ordered to turn over "full possession and title" to said land "free and clear" of all incumbrances and free of all other claims set out in said petition and that they be discharged of all of said mortgage debt above said $6000.00.

That to order that said Respondent can recover only said appraisal of $6000.00 and no more and that said stock and rent be credited on said debt and for all other relief to which they are entitled under said acts of Congress.[1-2]

Respectfully submitted,

Rufus Meshberger and
Lelia B. Meshberger,
Husband and Wife, Petitioners.

---

[1] And to hold that the action of said Respondent in bringing said stock and rent into this trial before said Judge Duffy re-opened said judgment of May 27, 1941, and to a consent that said Court had jurisdiction to allow them (—19—) the right to redeem.

[2] Admission that question as to redemption was open will be shown in Brief to be filed herein. (R. p. 115 middle—Appellant's Brief Court Appeals, p. 31.)

STATE OF INDIANA
COUNTY OF ADAMS } SS:

Rufus Meshberger, being duly sworn says he is a resident of said County and State of Indiana and that he is one of the petitioners in the above cause and that the facts set out therein are true as he is informed and believes.

Rufus Meshberger

Subscribed and sworn to before me this 3rd day of February, 1944.

Samuel E. Cook,
Notary Public

My Commission expires 4-7-1947.

Samuel E. Cook, Huntington, Indiana
Elmer McClain, Lima, Ohio
Counsel for Petitioners

STATE OF INDIANA
COUNTY OF HUNTINGTON } SS:

Samuel E. Cook, Counsel for the above, petitioners, does hereby certify that in his opinion the above and foregoing petition for an appeal in said cause to the Supreme Court of the United States is well founded and presented in good faith and not for delay.

Samuel E. Cook,
Counsel for Petitioners.

February —, 1944

SUMMARY OF ARGUMENT

I

The Conciliation Commissioner fixed the value of the land at $6,000.00 and gave the Debtors one year in which to redeem it. The order required the Creditor to accept that amount for the land within said time. The Creditor rejected the order and attacked it by taking an appeal from the District Court to the Circuit Court of Appeals and tried to overthrow this judgment on its assigned error on the ground that the valuation of the land was too low and should have been higher and that the one year to redeem was too high. That it filed a brief of 15 pages and took all of the steps to perfect said appeal, and assigned as error that the valuation was too low and the time to redeem too long. That it also charged that the granting of one year to redeem was improper and was not provided for by the statute and was arbitrary and unreasonable and argued said questions in their Brief, it filed in said cause. That it carried on this appeal for 15 months and finally the Circuit Court of Appeals affirmed said order below.

II

At the same time there existed a decision of this Court in Branson v. LaCross & Milwaukee R. R. in which said Court held that:

> "They (the Respondent) having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it pending the appeal. They assert that the decree is founded in error and for that reason should not be executed, but should be reversed and corrected in the Appellate Tribunal. The appeal suspends the execution of the

decree." Bronson v. The LaCross & Milwaukee R. R., 1 Wall 405 (17 L. Ed. U. S. 616). (Our parentheses.)

III

In 6th Cyc. Fed. Proc. Sec. 2862, p. 341, the Author states the same in the following words:

> "Accordingly, one appealing from a decree or judgment in his own favor supersedes it by so appealing and can not execute it; and subsequent taking of a cross-appeal does not alter the case."

IV

In Kahn v. American Surety Co., 162 S. 339 (335), the Court upheld the Supreme Court as follows:

> "Any Act, judgment which of its own force and effect produces a suspension or stay of proceedings in a cause, is a supersedeas. When we say that an appeal or writ of error acts as a supersedeas, we mean it suspends the proceedings below in the same manner that an order of a supersedeas does."

(Note) If this order could not be executed it was dormant and not running against the debtors. It did not begin to run until the Creditor's attack was ended by the Court of Appeals in affirming the order on October 9, 1942.

V

Also 4th Corpus Juris states:

> "Thus any Act, judgment, or proceedings which of its own force and effect produces a suspension or stay of proceedings, is a supersedeas."

In First National Bank v. State, the Court in 131 F. 430 upheld the Supreme Court as follows:

"The precise point here raised has not been discussed in the National Courts, because the practice adopted by Appellant in the case is virtually unknown; but it has been incidentally referred to in several decisions to the effect that the decree in the District or Circuit Courts, when an appeal is taken therefrom, is suspended until the appeal is disposed of. This rule is frequently stated in Admiralty and other causes."

VI

The decision of the Court of Appeals is in violent conflict with the decision of the Supreme Court in the Bronson case and all of the other authorities set out above and those cited in Rose's Notes to the Supreme Court decisions and it will have to be reversed to restore uniformity of the decision on the point in question. The District Court is a Court of Equity and hence has a wide discretion in seeing the "Distressed farmers" are allowed to redeem.

VII

Rose's Notes to the decisions of the Supreme Court cite a number of cases in support of the decision, but none against it or modifying it, or distinguishing it.

VIII

The order as to the value and time was final at the beginning but when the Debtors, December 8, 1942, out of time, filed their petition to redeem and showed they could redeem, the Creditor appeared and instead of adhering to the order, it took issue on a new cause of action and brought a new cause into the case in this: It demanded a judgment against the Debtors on an entirely new action which had not been in the first hearing, $450.00 on certain stock and $843.00 on rent, and at the first trial obtained

judgment for the same. This action of the Creditor amounted to an abandonment of the order in question and opened it up so as to give the Court jurisdiction to have a new trial to extend the time to redeem and to which gave it power to allow redemption, as the money was in Court at that time.

IX

As shown by the authorities you do not need to appeal from every order entered in bankruptcy. The Court is open and can modify or change any previous order where the litigation is between the parties, as in the instant case.

We quote from Creditor's Brief on its appeal as above as follows:

> "First . . . Since a bankruptcy proceeding, from the filing of the petition to the final settlement of the estate, is but one continuous suit, and since the bankruptcy Court is always open and has no terms, any order of the court may be re-examined and vacated within such pendency unless such vacation would disturb rights which have become vested in reliance upon such order or action." (Appellant's Brief, p. 12.) Brief, p. 12.)
>
> (Kimm v. Cox, 130 F. (2d) 721.)

Enough has been said in this part of the Brief. This decision must be reversed.

Respectfully submitted,

SAMUEL E. COOK,
Huntington, Indiana,
ELMER MCCLAIN,
Lima, Ohio.
Counsel for Debtors.

INDEX

	Page
Summary of Argument	i-iv
(1) Acts showing jurisdiction of Supreme Court	2
(2), (3), (4), (5) Showing jurisdiction	3, 4
III. Previous brief brought questions before court	6
IV. Assignment of errors now before the court	6
V. The argument proper	7
(1) Power over bankruptcies like power "to declare war"	7
(2) Intent of Congress in enacting the law	7
(3) How it should be construed	7
(4) Blackstone's rule as to a new law. It applies here	8
(5) Mischief was nothing to stop foreclosures of farm mortgage	8
(6) Nothing to aid victims general depression	9
(7) Purpose of act to save farms	9
(8) Duty to enforce the law rests on the courts	9
(9) Greater courage to enforce a law than to enact it	9
(10) Duty of the court. Law a "dead letter" unless enforced by them	10
(11) Purpose of act	10
(12) Court left no room for doubt as to how act should be construed	10
(13) Rule of construction set out in full	10
(14) The Supreme Court was not speaking to parties but judges of Court of Appeals—telling them to allow redemption	11

Page

(15) Power of Supreme Court to tell inferior Federal court how to decide 12

(16) State laws urged to defeat acts of Congress 12

(17) Superiority of Federal laws over State laws 12

(18) Bankruptcy act held constitutional and that the 5th, 10th and 14th amendments do not restrict the power of Congress 13

(19) Property rights created by States can be brought into bankruptcy proceedings 13

(20) Court of Appeals took wrong theory 13

(21) Bankruptcy act not a harsh law. One-half million farmers lost their homes 13

(22) Court of Appeals ignored bankruptcy law and followed technical rules which led it astray 14

(26), (27) The record shows the value of land was fixed at $6,000.00 and the time to redeem at one year 15

(28) The creditor attacked the order by an appeal and tried to overthrow the value and the one-year period to redeem 15

(29) The creditor in its appeal attacked said valuation of the land as too low and the time too long 15

(30) It executed and filed an appeal bond 16

(31) It requested the clerk to make out a transcript to take said appeal, which was done 17

(32) It filed a brief of 15 pages and filed in the Court of Appeals 17

(38) The creditor admitted the court had the power to extend the time to redeem 21

Page

(39) Creditor waged its appeal until October 6, 1942 (about 15 months)..... 21

(40) Then the court affirmed the judgment of $6,000.00 and one year against him..... 22

(41) The Supreme Court and a number of other cases decided that the appeal amounted to a stay or supersedeas and that judgment could not be executed and hence did not run against the debtor until the appeal was disposed of, October 9, 1942.. 22

(42) The question as to whether the one year ran during the appeal was not before the Court of Appeals, hence any statement about it being moot was not before that court and hence what it said about that was obiter dictum, and what it did say did not bind the debtors..... 22

(43) The creditor denounced the order fixing the value and the time to redeem as arbitrary and unreasonable. That stopped it from changing its color and urging that it ran against the debtors. The creditor will not be allowed to "blow hot and cold." If the creditor could not execute its judgment, it could not at the same time say it was running against the debtors..... 23

(44) Citation of Bronson case of the Supreme Court and other authorities all holding that the action of the Land Bank in appealing from said order fixing the value of the land and the time to redeem, amounted to a stay and supersedeas and that order did not run against the Debtor until the appeal was disposed of. The Creditor nor Court of Appeals cited no cases to the contrary..... 24

Page

(45) Rose's Notes of the decisions of the Supreme Court show that the Bronson case has not been overruled but has been cited a number of times with approval as law 25

(46) Shows the decision of the Court of Appeals is in conflict with 5 or 6 prominent cases and in conflict with the decision of the Supreme Court in the Bronson case. This calls for supervisory powers of Supreme Court and the Court did not cite a single case to support its position. If the Court of Appeals had examined the Bronson case and others that uphold it, it would have been its imperative duty to allow the Debtors petition to redeem 26

(48) The Creditor by filing its cross-action for $450.00 for the stock and $843.00 for the rent opened up the order and took away its character as a final order by bringing in a new claim and it extended the time to redeem by filing and recovering judgment for said claims 27

LIST OF CASES CITED

Page

Blackstone's Common Law of England, Star Page 87..8, 9

Borchard v. California, 310 U. S. 317..... 11

Bronson v. Lacross, etc., 1 Wall. 406 (17 L. Ed. U. S. 616) 24, 26

Chandler Act, Sec. 24.....2, 3

Corpus Juris, P. 1108 Sec. 685.....24, 26

Federal Land Bank v. Meshberger, U. S. Circuit Court Appeals, 7871 18

First National Bank v. State Nat., etc., 131 Fed. R. 430 .....25, 26

Hancock, John, etc., Inc. Co. v. Bartels, 308 U. S. 186.. 11

Kalb v. Feuerstein, 308 U. S. 433.....11, 12

Kahn v. American Surety, 162 So. 339.....24, 26

McCulloch v. Maryland, 4 Wheat. 316..... 7

Norman v. Baltimore, etc., R. Co., 294 U. S. 240..... 7

Sec. 47-11 U. S. C. A.....2, 4

Sixth Cyc. Fed. Proc., P. 341.....25, 26

U. S. Code 1926, Sec. 861-861b..... 4

U. S. v. Chin Dong Ying, 229 F. 813.....26, 27

Wright v. Vinton Branch Bank, 300 U. S. 440..... 9

Wright v. Union Central, 311 U. S. 273..... 8

Wright v. Union Central, 304 U. S. 502.....12, 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

RUFUS MESHBERGER AND LELIA B. MESHBERGER, Husband and Wife, *Debtors,* vs. THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY, *Respondent.*	No. ———

PETITIONERS' AND DEBTORS' BRIEF IN SUPPORT OF SECOND PARAGRAPH OF PETITION FOR APPEAL, AS OF RIGHT, FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Come now the Petitioners and Debtors in the above entitled cause and file with their petition for an appeal, as of right, their Brief in support of said petition and the assignment of errors filed therewith from the judgment of said United States Circuit Court of Appeals to the Supreme Court of the United States on the following grounds:

I

EXPLANATION

(1) That said Petitioners and Debtors, Rufus Meshberger and wife have filed a previous petition in this cause in said Supreme Court for a writ of Certiorari embracing the same proceedings in Bankruptcy in the above cause, asking said Supreme Court to order said Circuit Court of Appeals to send up the record of said proceedings to the Supreme Court to review and correct said proceedings.

II

(1) As to Appeals: In Chandler Act, Sec. 24 (a), June 22, 1938, and Sec. 47a 11 U. S. C. A., it is provided:

> "Sec 24. JURISDICTION OF APPELLATE COURTS.—The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions 'in proceedings in bankruptcy,' either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact." (Quotations ours.)
>
> "Sec. 47. JURISDICTION OF APPELLATE COURTS, Provides:
>
> a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate

jurisdiction from the several courts of bankruptcy in their respective jurisdictions 'in proceedings in bankruptcy,' either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact'':

(2) It will be noted that this defines jurisdiction: "In proceedings in bankruptcy" and "in controversies arising in proceedings in bankruptcy." It will not be disputed but that the "proceedings" in this case come within said Act.

(3) Then provision is made for appealing from the Circuit Court of Appeals to the Supreme Court "in proceedings in Bankruptcy" as follows: In Chandler Act, Sec. 24 (c), June 22, 1938, and Sec. 47 (c) 11 U. S. C. A.

"c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Court of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

"c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

(4) Then the Act provides:

"b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal." (Chandler Act, Sec. 24 (b), June 22, 1938.)

"b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal." (Sec. 47 (b), 11 U. S. C. A.)

(5) This Act took the place of the previous provision for a Writ of Error, which was abolished on January 31, 1928. The Act reads as follows:

"ACT OF JANUARY 31, 1928

Chapter 14, 45 Stat. 54

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

Sec. 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: Provided, however, That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts." (U. S. Code 1926 to December 3, 1928. See 861a and 861b Revised Rules of the Su-

preme Court of the United States Appendix, page 10.)

"(c) Section 2 of the above Act was amended April 26, 1928, as follows:

> "Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and invoking such relief, including the provisions relating to the appeal which the preceding section substitutes for a writ of error."

"(d) The Act as to Writs of Error reads as follows:

> "This section prior to its amendment read as follows: 'In all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: Provided, however, That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts.' United States Code Compact Ed. to December 3, 1928, after 861b."

On the original transcript of the Record filed in said Court of Appeals which will be filed in this appeal, and that said petition for a writ of certiorari and this petition to appeal, as of right, as provided by the above Acts of Congress, said appellants will ask in both cases that they shall be taken and based upon the same transcript as certified from said Court of Appeals to this Court. That such a plan will make it possible to bring both of said appeals

and to properly present them to the Court without going to the unnecessary expense of procuring and filing two copies of said transcript. And they now ask Court for leave to allow both appeals to be taken in said manner.

III

(1) That in filing the brief in support of the petition for certiorari they have already set out certain general statements and steps which are required by the Rules in such a brief. It would be only repetition to set out said statements the second time.

(2) The matters on page 12 of the Brief in support of the petition for certiorari to Specification IV, page 17, are already before the Court and need not be repeated.

IV

SPECIFICATION OF ERRORS

(1) The specifications of errors have heretofore been set out on page 12 to V Summary of Argument. The petitioners herein have prepared a later form of assignment of errors and it has been printed and covers 17 pages which will be filed with the petition under the direct appeal, as of right. This printed assignment is now before the Court and it will have to be assumed that it will be read by the Court. That hence, it is not necessary to repeat the assignment again.

V

THE ARGUMENT

The following additional argument of points of fact and of law in support of the petition and assignment of errors will be submitted:

(1) We realize it is not an easy matter to present the questions in an appeal and the law applying to them. There are no weak places in the Debtor's case. It is our purpose to present this Act as a bankruptcy law we "are expounding" and how it shall be construed. That the power of Congress providing for this Bankruptcy Act is one of the greatest powers vested in the Congress and is in the class with the power to "coin money and regulate the value thereof" or to declare war or direct an embargo which may cost millions to our citizens.

Norman v. Baltimore, 294 U. S. 240 (79 L. Ed. 885).

(2) This law is different from all others. Like Chief Justice Marshall observed:

> "In considering this question, then, we must never forget that it is a Constitution we are expounding."
>
> McCulloch v. The State of Maryland, 4 Wheaton 316.

(3) There is no dispute but that the Act of Congress of March 3, 1933, as amended by adding a new Subsection (s) August 28, 1935 (11 U. S. C. A. 203 (s)) provided for the following:

> "This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt."

Wright v. Union Central (December 9, 1940), (311 U. S. 273). And the Court beneath that statement cited three very recent decisions of the Supreme Court.

(4) The purpose for which a law is passed must be considered—to give it a proper construction. That is the light which should guide the Court. It must also be given a liberal construction to carry out the intent of the Law-giver. If possible a construction which would defeat the purpose of the Act should be avoided and if a more liberal construction which would carry out some great public purpose or public demand for such an Act, such a construction should be adopted. It is not an objection to an Act of the Legislature, that in doing good to the public, private rights may be infringed. Each person on entering Society surrenders part of his private rights for the rights and protection that Society gives him.

(5) Blackstone said on the point of enacting laws and of the great obligation resting on the Courts to enforce them, the following:

"There are three points to be considered in the construction of all remedial statutes; the old law, the mischief and the remedy; that is, how the common law stood at the making of the Act. What the mischief was, for which the common law did not provide; and what remedy the Parliament hath provided to cure this mischief. And it is the business of the Judges so to construe the Act as to suppress the mischief and advance the remedy." (Introduction Sec. 3 (Star Page 87) bottom page 53, Blackstone's Commentaries on the Laws of England.)(1)

(1) Aside: It is said more copies of this were read in America prior to the Revolution than in England. It must not be forgotten that "Here once the embattled farmers stood, and fired the shot heard round the world."

(6) What was the mischief in our land prior to and at the time our farm mortgage legislation began to be developed? There was no Act of Congress to stop wholesale farm mortgage foreclosures, and it was threatening the stability of our Government.

(7) The Supreme Court said in Wright v. Vinton Branch Bank, March 29, 1937, 300 U. S. 440, that the new legislation (Act of March 3, 1933) and its amendment (by adding a new Sub-section (s) August 28, 1935) was the remedy to cure the mischief in these words: "The Legislation is designed to aid victims of the general economic depression: (Wright v. Vinton Branch Bank, 300 U. S. 440.)

(8) The situation was serious: It will not be disputed but that the State Courts were glutted with suits to foreclose American farm mortgages and the newspapers were full of notices of Sheriff's sales of farm mortgage lands. Thousands of farmers were driven from their farms. This legislation was enacted to stop this and to aid the "distressed farmers" to stay on their farms and to put them on their feet again.

(9) Note that Blackstone further says that it was the duty of the Courts to so construe the Acts as to suppress this evil or mischief and to advance the remedy, a full application of the law. Instead of doing that in this and many other cases, many of the Inferior Federal Courts hunted for technicalities which defeated the purpose of the Acts and retarded the remedy. A law not enforced or applied is a "dead letter". In my opinion it takes greater courage to enforce a law than to enact it. We will show what Blackstone said was the law over 180 years ago was the law when these Courts decided the Wright case December 9, 1940, and on December 2, 1942, when this Court decided the case at Bar.

(10) We have already shown that if that Court had followed that law it would have allowed these farmers to redeem their Homes and ordered the Creditor to accept the $6,000.00 with proper credits and go hence without delay. And the money that this litigation will cost could have been used to put some buildings on the land. (As there are no improvements on the land.)

(11) We have already shown that the Supreme Court stated in Wright v. Union Central, 311 U. S. 273, that the purpose of this legislation was intended as follows:

> "This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt."

Citing three former decisions of that great Court.

(12) There never was a clearer description of the condition of the class Congress intended to aid by this new legislation, than given by Justice Douglas in the above opinion. It will stand the test of time. In all fairness Honor Bright Counsel cannot understand how the Inferior Federal Courts could read this language without being greatly impressed by it and that it placed on them the duty, as Mr. Blackstone states, to so construe the Act as to stop this loss of American farm homes or in other words to "suppress" this monster and to advance the remedy (the power of the courts), which was in their hands and that the law would be a "dead letter" without them giving it life by applying it and enforcing it.

(13) This is not all. The Supreme Court saw the above conditions were so threatening to the good of the Country that it would not leave any room for doubt or misunderstanding as to the duties of the lower Courts to give this

law a construction to save American farm homes. It further stated:

> "Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. John Hancock Mut. Life Ins. Co. v. Bartels, supra (308 U. S. at p. 186); Borchard v. California Bank, supra (310 U. S. at p. 317). There is no constitutional claim of the creditors to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress (John Hancock Mut. Life Ins. Co. v. Bartels, supra; Kalb v. Feuerstein, 308 U. S. 433), lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."

(14) To whom was the Supreme Court directly speaking in using this clear language? Go examine the great opinions. This Court was not speaking to the parties nor to the Counsel. Who was it addressing? The introduction to the opinion shows that it was speaking to the United States Court of Appeals and the Judges of that Court for the Seventh Circuit, the same Court as the one in this cause. It further appears that the same District Court as in the case at Bar had ordered Mr. Wright's land sold at a public auction in bankruptcy proceedings. And that this Circuit Court of Appeals had approved of the judgment in denying the right to redeem and ordering the land sold.(1) In passing: Did this Court of Appeals ever allow the Debtors to redeem their land under this Act?

---

(1) And this Court had to stop it.

(15) What did the Supreme Court mean? It not only has the power to decide all cases coming before it, but a still greater power to tell the Inferior Federal Courts how to decide them. To tell them what the law is and that confusion in laws means no law. This supervisory power wisely brings about uniformity in the decisions and no limit has been placed on that power. A Federal question may come before a State Court. Local feeling might cause the State Court to lean against the National view. That would soon break down the National character of our Government. In our form of Government there are no state Bankruptcy laws. The power to impair the obligation of a debt and wipe it out was delegated to the Congress of the United States. In the fight against this Act, its opponents tried to use the state laws to defeat this Federal Law by claiming that the States had created property rights, and that this Federal Act violated the Federal Constitution. Many of the Inferior Federal Courts so held.

(16) This Court had exploded that theory in Kalb v. Feuerstein, January 2, 1940 (308 U. S. 433). It will be noticed in that case the State Court was about to take charge of and administer the insolvent Debtors' estate. Then they insisted that this new Act violated the 5th, the 10th, and the 14th Amendments to the Organic Law. This would have killed the law if this Court had not held these amendments were not violated. (Wright v. Union Central 304 U. S. 502, 1940.)

(17) It was in this case that this Court also asserted the Superiority of a Bankruptcy Act over State Laws. It pointed out "That the right of Congress to legislate on the subject of bankruptcies is granted by the Constitution in general terms." That clause 18 of the Constitution gives it the power—"To make all laws which shall be necessary and

proper for carrying into execution of the foregoing powers."

(18) The Court further said in Wright Case, 304 U. S. 502:

"We have held that Section 75 (s) does not unconstitutionally affect the rights of the mortgagee. We do not think the provision for extension of the period of redemption in Section 75 (n) is invalid."

(19) And a further point: "If the Argument is that Congress has no power to alter property rights because the regulation of rights in property is a matter reserved to the States, it is futile. Bankruptcy procedure constantly affects the property rights established by State law." * * * "Property rights do not gain any absolute inviolability in the Bankruptcy Court because created and protected by State Law." (Wright v. Union Central, 304 U. S. 502.)

(20) The Supreme Court had admonished this Court of Appeals to so construe this Act and proceedings to allow the Debtors to redeem. It took the wrong theory and denied them of that right.

(21) It has been urged that this is a harsh law and much opposition has been stirred up against it by other classes of Society. It is true Congress has brought the Bankrupt's debt down to the appraised value of the land. It would not have been a bankruptcy Act if it did not provide for that. It would have not "rehabilitated" the "distressed farmers" who were faced with "the disaster of forced sales" and an "oppressive burden of debt". How else could they have been relieved? There was no other way on earth. It is said even with this remedial Act a half million or more "distressed farmers" gave up the ghost and lost their homes. They turned down the lane for a last time and for

the last time looked on their ancestral Homes, as dear to them as "light and life". Why should any Court refuse to allow them to stay when that is what Congress and this Court ordered them to do? Over a hundred years ago this Court decided that Congress in enacting a law is the Judge of the means it will employ to execute its Constitutional powers. The means it employed here was to allow the farmer to keep his farm at its value. If we had no farm homes we would have no country. "Ill fares the land, to hastening ills a prey, where wealth accumulates and men decay."

(22) Why did this Court of Appeals not construe these Acts and this decision of the Supreme Court in the Wright appeals, and allow the Debtors to redeem? The Court did not consider or realize it was deciding a Bankruptcy case. It ignored the Bankruptcy Act and tried it under other Technical rules clear outside of the Bankruptcy Laws. It tried the case on an erroneous theory of the law. No Court can ever reach the right conclusion by listening to the "song" of the wrong theory. Away with the wrong theory. It leads to destruction and to injustice.

(23) It has not been disputed nor never will be but that the record shows the Creditor took the following steps in the case which overthrew its theory namely:

(24) The first thing is that on February 17, 1941, the Judge of the District Court referred the Federal Land Bank case (the Respondent herein) to Hon. Fred B. Dressel as Supervising Conciliator of said Court "to take and hear the evidence regarding said real estate of this debtor and to fix such value. Also to fix a time in which the Debtor shall redeem said real estate." (R. 30.)

(25) That the second thing was that on May 27, 1941, said Dressel filed his report relative to the value of the real

estate and a period for redemption which report reads in the words and figures following to-wit: (1) (R. 30.)

(26) "It is further ordered that Rufus Meshberger, Debtor, shall redeem within one year from the date of the entry of this order at the value of $6,000.00, the real estate upon which the Federal Land Bank of Louisville, Kentucky, holds a lien as follows to-wit:

> The Northwest quarter of the northwest of section ten (10) and the east half of the northeast quarter of section nine (9) all in Adams County, Indiana." (R. 31.)

(27) The next thing that happened was—did the Land Bank abide by said judgment as to the $6,000.00 value or the one year in which to redeem? No never. It immediately attacked said judgment with all of its fury by an appeal to the Circuit Court of Appeals of the Seventh Circuit.

(28) What were the evidences of that appeal and did it attack the one year order in which to redeem? Here is the Record. We quote:

"August 9, 1941: Notice is hereby given that the Federal Land Bank of Louisville, Kentucky, appeals from a certain order entered in this cause by this Court on the 10th day of July, 1941, which order is in the words and figures as follows to-wit: 'The Appellant believes that by reason of the entry of said order, certain errors were committed by the Court to the prejudice of the Appellant, all of which will in more detail appear in Appellant's points of alleged order which is filed with and accompanies this notice.'" (R. 40.)

(29) The above was followed by the following statement of the Land Bank:

---

(1) His action was approved July 10, 1941.

"The Court erred in denying the petition of the Federal Land Bank of Louisville to review the report and order of the Supervising Conciliation Commissioner and in confirming the order the ..... Commissioner because the time given (one year) in the report and order of the ..... Commissioner in which the Debtor could redeem was not reasonable, being too long, ... and the order ..... fixed too low a valuation upon the real estate." (R. 42.)

(30) APPEAL BOND. Know all men by these presents: That we, the Federal Land Bank of Louisville, Kentucky, and Fidelity and Deposit Company of Maryland, Baltimore, Maryland, are held and firmly bound unto the United States of America in the sum of $250.00 to be paid to said Rufus Meshberger, etc. .....

Sealed with our seals and dated this 7th day of August, 1941.

Whereas, the above named, The Federal Land Bank of Louisville, has prosecuted an appeal to the Circuit Court of Appeals for the Seventh Circuit to reverse and order in the above entitled cause by the District Court of the United States for the Northern District of Indiana.

Now the Condition ..... The Federal Land Bank ..... shall secure the payment of the costs if the appeal is dismissed or the judgment.

August 11, 1941.

Signed by THE FEDERAL LAND BANK
OF LOUISVILLE.

(R. 43.)

(31) CREDITORS' PRAECIPE.

"You are hereby requested to make a supplemental transcript of record in this cause to be filed in the United States Circuit Court of Appeals for the Seventh Circuit, pursuant for an appeal allowed in this cause and to include in said transcript of record the following and no other papers or exhibits, to wit:

2. Statement of points of alleged error, filed by The Federal Land Bank of Louisville.

7. Order granting the petition of the Federal Land Bank of Louisville for Appeal.

J. F. Williamson,
John S. Grimes,
Attorneys for Appellant.

The Federal Land Bank of Louisville, Kentucky." (R. 49.)

(32) There is no doubt but that the Federal Land Bank appealed from this judgment which fixed the time at one year to redeem the land and on the ground that the time was too long and the land valued too low. To clinch the matter said Land Bank filed a Brief in said appeal of some 15 pages. (R. 107-122.)

This was the ordinary brief filed under the Rules as follows:

"IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 7871

IN THE MATTER OF RUFUS MESHBERGER, *Debtor,*

THE FEDERAL LAND BANK OF LOUISVILLE,
Appellant,

vs.

RUFUS MESHBERGER,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION, HON. THOMAS W. SLICK, JUDGE.

APPELLANT'S BRIEF

STATEMENT OF THE CASE

NATURE OF THE ACTION

"This is a proceedings under Subsection (s) of Section 75 of the Bankruptcy Act, as amended August 28, 1935, commonly known as the "Frazier Lemcke Act."

"The appeal is taken from an order of the Court below, fixing the value of the property and giving the Debtor a year in which to repurchase the property under the pro-

visions of paragraph (3) of Subsection (s). Appellant asserts that the value fixed was too low and the granting of a year within which to repurchase prior to sale was improper, not being provided for by the statute and at any rate was arbitrary, unreasonable and too long." (R. 108-109.)

(33) "At the hearing upon these petitions evidence was taken." (R. 12-79.) "The Supervising Conciliation Commissioner filed his report and order thereon, on May 27, 1941" (R. 80-82). "The Debtor filed exceptions and petition to review the report and order (R. 82-87) and assignment of errors (R. 81-87). The Federal Land Bank of Louisville also filed exceptions and petition to review. (Supplemental Record.) The petitions to review of the Federal Land Bank of Louisville and the Debtor were denied and the order of the ..... Commissioner was confirmed." (R. 109-110.)

Thomas W. Slick,
Judge U. S. District Court.

"To this order the Federal Land Bank of Louisville filed its notice of petition for appeal." (R. 109-110.) (R. 102-103-107-108.)

(34) CONTESTED ISSUES.

1. "That the report and order were erroneous in giving the Debtor a year from the date of the order in which to redeem the real estate at the appraised price; and (2) That the valuation in the report and order was too low and did not represent the proper valuation of the real estate." (R. 110.)

(35) As to the ruling on the petition for review:

"(1) The Court erred in denying the petition of the Federal Land Bank of Louisville to review the report and

order of the Supervising Conciliation Commissioner, in confirming the order of the Supervising Conciliation Commissioner, because the time given in the report and order of the Supervising Conciliation Commissioner in which the Debtor could redeem was not reasonable, being too long. (R. 110-111.)

"(2) The Court erred in denying the petition of the Federal Land Bank of Louisville to review the report and order of the Supervising Conciliation Commissioner and in confirming the order of the Supervising Conciliation Commissioner, for the reason that said report and order of the Supervising Conciliation Commissioner fixed too low a value on said real estate." (R. 111.)

(36) "PROPOSITION 1".

"The Court was without power to give the Debtor an additional year in which to redeem the real estate at the valuation fixed." (R. 111.)

(37) "2" SECOND ASSIGNED ERROR.

"The Court erred in denying the petition of The Federal Land Bank of Louisville to review the report, ... for the reason that said report of the Supervising Conciliation Commissioner fixed too low a valuation upon the real estate." (R. 111.)

(38) ARGUMENT.

"The granting of the additional year of redemption was not in accordance with the provisions of Subsection (s) of Section 75 for the Bankruptcy Act ....." (R. 113.)

"CREDITOR'S BRIEF MADE THE FOLLOWING STATEMENT:

"The appellant does not contend that the Debtor's right

to redeem at the end of the three years is absolutely foreclosed at midnight on the third anniversary. Clearly, this is an equitable action, and where the Debtor is able to redeem at the fixed valuation the Court has, in its discretion, the right to permit the payment of the redemption price." (R. 115.)

That is an admission that the matter of extending the time was a matter in the last analysis, was in the discretion of the Court to be exercised as deemed necessary to allow the Debtor to redeem, if the money was paid in before the case was closed. That was what was done here.

(39) TO RESUME: The Federal Land Bank fought with "fire and tongs" its appeal from the order in the District Court and Court of Appeals from August 7, 1941, to October 6, 1942 (nearly till "the frost is on the punkin") two years and three months, to lower the Debtors year to redeem and to require him to raise the value of the land above $6,000.00. And what was the result—said Court of Appeals on October 6, 1942:

"IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT"

OCTOBER TERM OF SESSION 1942

No. 7871

"In the Matter of Rufus Meshberger, *Debtor.* The Federal Land Bank of Louisville, Kentucky, *Appellant,* vs. Rufus Meshberger, *Appellee.*	Appeal for District Court of the United States for the Northern District of Indiana, Fort Wayne Division

OCTOBER 9, 1942

"Before Evans, Major and Kerner, Circuit Judges: (R. 129.)

"In view of the lapse of time since the entry of the order appealed from, and which has made moot the various questions raised by appellant, it is ordered and adjudged, that the order appealed from be and is hereby affirmed. It is further ordered that the mandate be issued forthwith." (R. 129.)

(40) To resume: We come to one of the important questions in this appeal. On May 27, 1941, Mr. Dressel had fixed the value of the land at $6,000.00 and the time to redeem at one year from that date. This was finally confirmed by the Court. The Land Bank appealed from that order on August 7, 1941. It presented its appeal and turned and turned "Heaven and Earth" to change that order, to get the land up and the time down, until October 9, 1942 (15 months) before the Court of Appeals affirmed the decision below.

(41) Did the one year of time to redeem run during that appeal or was it dormant until the appeal ended? We will show by a decision of the Supreme Court and other authorities that the effect of the bank in taking said appeal acted as a stay or supersedeas which prevented the Creditor from enforcing the judgment against the Debtor and if he could not execute the order himself it did not run against the Debtor until the appeal was disposed of.

(42) That said question as to whether said year of time ran against the Debtor while the Creditor was prosecuting said appeal, was not presented in said Creditor's appeal as above, nor in the Debtor's appeal as shown in the Record (R. 32 to 40), which was dismissed on October 9, 1942,

the same day the Creditor's appeal was affirmed. (R. 129.) That said question not being before said Court, could not have been decided by it. That the only question presented to said Court of Appeals by said Land Bank was that the valuation of said land was too low and the time given the Debtor to appeal was too long. That said statement of said Court of Appeals as above was as follows:

"That on account of the lapse of time since the entry of the order was made, ... has made moot ..... various questions raised by appellant. That the statement of the Court affirming the order below disposed of said appeal and exhausted the powers of the Court, and said questions not being before said Court it follows, as "the night the day" as to said questions being "moot" is obiter dicta.

(43) The Appellee has gotten itself into a ridiculous position as to its appeal in this: It asserted in appealing from this order—"that the value fixed was too low, that the granting of a year within which to repurchase prior to sale was improper, not being provided for by the statute, and at any rate was arbitrary, unreasonable and too long." (R. 108-109.)

Then after holding the appeal up for 15 months and turning "Heaven and Earth" to nullify this order it turns around and seeks to change its color and claim the year was running against the Debtor during the year from May 27, 1941. It is absurd and unreasonable for the Creditor to do all it could to trample down the order of May 27, 1941, for 15 months, then, claim it was running against the Debtor, when, during the whole of said period it claimed it was void, when its appeal made it impossible for the Creditor to enforce the order. If the Creditor could not execute the order he could not claim it was running against

the Debtors. Hence the time of one year did not begin until the way was cleared by the decision of the Court of Appeals on October 9, 1942. Hence, the petition to redeem was filed in time and the deposit of $6,000.00, March 19, 1943 (R. 94) was made in time and the previous offer of the Responsible Bank December 8, 1942. (R. 59-61.)

(44) We now come to the cases which holds that the Court of Appeals was wrong in denying the Debtors the right to redeem their home. They are as follows:

"We cite Kahn v. American Surety Company (1935), 162 Southern 339 (335) on this point, and quote therefrom the following:

> **'Any Act, judgment or proceeding which of its own force and effect produces a suspension or stay of proceedings in a cause, is a supersedeas. When we say that an appeal or writ of error acts as a supersedeas, we mean that it suspends the proceedings below, in the same manner that an order of a supersedeas does.'**

Also (4th Corpus Juris Sec., Page 1108): Section 625:

> **'A write of supersedeas is an auxiliary process designed to supersede the enforcement of the judgment of the Court below, brought up for review. In modern times the term is often used synonymously with a stay or proceedings with reference both to writ of error and appeal and is employed to designate the effect of an Act or proceeding which of itself suspends the enforcement of a judgment. Thus any Act, judgment, or proceeding which of its own force and effect produces a suspension of stay of proceedings is a supersedeas.'**

We also cite the controlling case on this point. Bronson, etc. v. The LaCross & Milwaukee R. R., 1 Wall. 405 (17 L. Ed. (U. S.) 616) and quote therefrom the following:

'They having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it pending the appeal. They assert that the decree is founded in error and for that reason should not be executed, but should be reversed and corrected in the appellate's tribunal. The appeal suspends the execution of the decree. Hence, it amounts to a stay or supersedeas.'

We also cite 6th Cyc. Fed. Proc., Section 2862 (p. 341), which applies here as follows:

'Accordingly, one appealing from a decree or judgment in his own favor supersedes it by so appealing, and cannot execute it; and the subsequent taking of a cross-appeal does not alter the case.'" (Appellants Brief, pp. 21-22.)

(45) "I have just examined Rose's Notes on the Bronson case. The latter is in good standing. The Notes cite 131 F. 430. I quote as follows:

'In the First National Bank, et al. v. State National, etc., 131 Fed. Reporter, p. 430, May 2, 1904, the Court said: "The precise point here raised has not been discussed in the National Courts, because the practice adopted by Appellant in the case is virtually unknown; but it has been incidently referred to in several decisions to the effect that the decree in the District or Circuit Court, when an appeal is taken therefrom, is suspended until the appeal is disposed of. This rule is frequently stated in Admiralty and other causes." Court cites 6 Wheat. 194, 203—5 L. Ed. 239—also cites the Bronson case—22 L. Ed. 251—22 L. Ed. 259— 26 L. Ed. 1065—27 L. Ed. 732 and 27 L. Ed. 888.'

Then the Court in this case, 131 F. 430—(431), quotes from the opinion in the Bronson case: 'In Bronson v. Railroad Co., supra, the Court said: "They having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it pending the appeal. They assert the decree is founded in error, and for that reason should not be executed, but should be reversed and corrected in the Appellate Tribunal. The Appeal suspends the execution of the decree." (P. 431). In Emsinger v. Powers cited above the Court said, "While the appeal was pending here, although there was no supersedeas, the Circuit Court had no jurisdiction to vacate the decree in pursuance of the prayer of a bill of review, because such relief was beyond its control." '(Bronson case cited 13 So. 920-21) (131 F. 432).

The Bronson case is cited with approval in U. S. v. Ching Dong Ying, 229 F. 813 (816).[1]

"All of the decisions cited in Rose's Notes upholds the Bronson case as the law—that the action of a party in appealing a case amounts to a supersedeas and that judgment cannot be executed while the appeal is pending. If that be true it is dormant and does not run against the Debtor until the appeal is settled." (Assignment of Errors, pp. 16-17).

(46) Thus the ill-considered decision of the Court of Appeals is in the teeth of the following decisions:

Kahn v. American Surety Co., 162 So. 339—4 Corpus Juris, page 1108 Section 625. Bronson v. LaCross & Milwaukee R. R., 1 Wall. 405 (17 L. Ed. (U. S.) 616.) (Leading Case) 6th Cyc. Fed. Proc. Sec. 2862, p. 341, First National Bank v. State National, 131 Fed. Reporter 430 (May 2,

---

(1) Strange that with all of this array of authorities, the Court of Appeals did not cite a single case in its favor. It could find none, and hence there were none to cite.

1904), 131 F. 430 (31) U. S. v. Ching Dong Ying, 229 F. 813 (816).

All of the cases cited in Rose's Notes uphold the Bronson case as the law—that the action of a party in appealing a case amounts to a supersedeas and that judgment cannot be executed while the appeal is pending. (Remember here the Respondent appealed from the judgment rendered against it.) If that be true the judgment is made dormant by the appeal and does not run against the Debtor until the appeal is settled, or until the Creditor can enforce its judgment.

(47) True, the Debtors' petition to redeem was filed after the time fixed in the first order on December 8, 1942. Instead of the Creditor standing by the judgment entered May 27, 1941 (and approved July 10, 1941) it ran away from and abandoned it and opened it up for new issues. It neglected to plead res adjudicata but filed a cross-action against the Debtors for $450 on certain stock, to which it had no right, title or interest and also in a cross-action demanded $843 of rent in the hands of the trustee. The authorities hold all it can get is the value of the land, $6000, and that it has no right to a penny more. (Rent R. 62—Stock R. 64.)

And the District Judge, that did not seem to understand it was trying a bankruptcy case, allowed the Creditor the above sums over and above the $6000. (R. 72-73.)

(48) The Court of Appeals held the above judgment was a final judgment. It was prior to the Debtors' petition to redeem. Then the Creditor abandoned it and filed a cross-action for the stock and rent. He did not treat it as a final judgment but opened and deprived it of its finality by abandoning it and bringing in two new questions and obtained a

judgment against the Debtors to the amount of $1,293. After doing that the Creditor cannot then try to bind the Debtors by the first judgment when it refused to abide by that judgment itself. That released the Debtors as to the question of time and gave the Court the discretion to extend the time to redeem. The Debtors had a commitment for the money to finance the $6,000 on December 8, 1942 This was verified by the petition and proven by the evidence at the trial. (R. 59-60.) This promise was made good by paying the $6000 into Court on March 19, 1943. (R. 94.)

The Court did not dispose of the Creditor's efforts to destroy the order as to the value of the land and time of one year, until October 19, 1943. (R. 129.)

It follows that the Court of Appeals had an opportunity to allow them to redeem. There is an old rule of Equity that comes to mind in substance: "A thing is considered done when it should have been done." Applying that rule the payment would date back. Why not? The case was still in Court between the same parties. No rights of others had intervened.

We have shown the jurisdiction of the Court, and the duty of the Court to review this decision and reverse the judgment of the Court of Appeals.

If we have omitted any other proper argument, we reserve the right to supply that later. Other points of law will be found in the assignment of errors already filed.

Wherefore, the Debtors pray the Court to review the decision of said Circuit Court of Appeals, as of right, and to set aside and reverse the judgment rendered in said cause, and to direct said Court below to sustain the Debtors

petition to redeem said real estate at $6000 with proper credits.

Respectfully submitted,

SAMUEL E. COOK,
Huntington, Indiana,
ELMER MCCLAIN,
Lima, Ohio,

Counsel for Petitioners.

(6)

Office - Supreme Court, U. S.
FILED
APR 26 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1943

No. 754

RUFUS MESHBERGER and LELIA B. MESHBERGER,
Petitioners,

vs.

THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF THE PETITIONERS.

ELMER MCCLAIN,
Lima, Ohio

SAMUEL E. COOK,
Huntington, Indiana,
Counsel for Petitioners.

U. S. Law Printing Co., Phone Lakeview 6581, Chicago, Illinois

Supreme Court of the United States

OCTOBER TERM 1943

No. 754

RUFUS MESHBERGER and LELIA B. MESHBERGER,
Petitioners,

vs.

THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF

On behalf of the Petitioners.

This reply brief will follow the order of the answer brief of the respondents which is designated a "Reply" Brief.

The paging of that brief will be followed as headings for reply to the matter contained therein.

Page 2 of Respondent's So-called "Reply" Brief

Section Numbered 2.

Failure by the bankruptcy court to distribute rental payments to the secured creditor, as required by Section 75(s)(2), is, of course, not to be imputed to the farmer debtors. That such rental was paid by the respondents has never been, and is not now, denied by the respondent.

Page 2 of Respondent's So-called "Reply" Brief

Section Numbered 2.

Both the petitioners' appeal and that of the respondent were taken on the same day, namely August 7, 1941. For petitioners' appeal see top of R. 39. For respondent's appeal see top of R. 40.

Page 3 of the Respondent's So-called "Reply Brief"

Section Numbered 1.

11 U. S. C. Section 203 (s)(3), that is Section 75 (s)(3), does not name or fix any period for payment into court of the redemption money when the court fixes a new valuation. This court said in *Wright* v. *Union Central,* 311 U. S. 273, that the farmer-debtor was in such a case entitled to have "a reasonable time, fixed by the court". No time so fixed by a court is a "reasonable time" where the secured crdeitor, the present respondent, itself sought the order and then contested its validity by appeal until long after the time set by the court.

The appellate court itself disagreed with the respondent for it held that the period fixed ran not from May 27,

1941, as originally set by the bankruptcy court, but from July 10, 1941, when respondent's contest of that order within the district court was decided. See Note at Page 22 of the petitioners' brief.

Pages 3 and 4 of the Respondent's So-called "Reply" Brief

The same Section Numbered 1.

The appellate court in its order at R. 55 entered October 9, 1942, did not hold that the redemption period expired May 27, 1942. On the contrary in its opinion it specifically held that the redemption period ran from July 10, 1941, the date when the district judge denied the respondent's petition for review. R. 140, middle of page, paragraph beginning "In the first place". See note 2 page 22 of the petitioners' brief.

Page 4 of the Respondent's So-called "Reply" Brief.

The same Section Numbered 1 at the first full paragraph on page 4.

The respondent's first full paragraph at page 4 beginning with the words "In refusing to deposit $6,000", totally ignores the fact that respondent itself muddied the waters by (1) seeking the $6,000 order, (2) by its proceedings for review in the district court, and (3) by its appeal in the appellate court, until long after May 27, 1942. It is estopped after it continuously stirred up the waters for a year and a half, to complain that the petitioners should have seen clearly that, after all the respondent's kicking would be disregarded. See pages 28 and 29 of the petitioner's brief.

Pages 4 and 5 of the Respondent's So-called "Reply" Brief.

Section Numbered 2.

Bronson v. *LaCrosse*, 68 U. S. (1 wall.) 405.

In substance the *Bronson* case and this *Meshberger* case are remarkably similar on the point discussed.

Point discussed: Whether a litigant who seeks and obtains an order and then contests it may insist that it can be executed during its contest.

Parallels

Bronson case	*Meshberger* case
I.	
Litigant sought and obtained a decree of foreclosure.	Litigant sought and obtained an order fixing valuation and time for payment. R. 29. Prayer of respondent's petition at end of petition, bottom of R. 29.
II.	
Litigant sought reversal of order it obtained. "A final decree of foreclosure was entered . . . *in favor* of the complainants . . . and an appeal was taken by those complainants". (Italics are those of the official report. 68 U. S. (1 Wall.) 405, end of first paragraph on page 406).	Litigant sought reversal of order it obtained. R. 32. Denial of respondent's petition for review.

III.

Litigant maintained the order it had obtained and contested by appeal could be executed during its appeal. See preceding quotation under heading II.	Litigant maintained the order it obtained and contested could be executed during its appeal.

The respondent is quite right when it says in its so-called "Reply" brief in the last half of page 5:

> "Mr. Justice Nelson fully recognized the settled rule" when he said "at page 410 (68 U. S.):" of *Bronson* v. *LaCrosse,* 68 U. S. (1 Wall.) 405, 410: "' . . . This is not a case where security is to be given in order to supersede the execution.'"

That is, where a litigant seeks foreclosure, obtains a decree of foreclosure and then contests it by appeal. So also in this *Meshberger* case, where the respondent sought an order fixing valuation and time for payment and secured such an order, and then contested it by appeal.

> "That rule [said the court] applies in cases where the decree or judgment is against the party appealing, and who desires to suspend the issuing of execution by the adverse party until the appeal is heard and determined."

That is, the *Bronson* case was a different case because the foreclosure decree was **in favor of**, Bronson, not against him, and Bronson appealed. So the Meshberger order fixing valuation and time for payment is also a "different case" because it was **in favor of** the respondent, not against it, and respondent appealed.

Exactly contrary to the misinterpretation of the *Bronson* case at the foot of page 5 in the respondent's "Reply" brief, that decision squarely holds that the successful party **may not** claim that a judgment in its favor may be executed during its appeal from that judgment. In the words of this court, beginning at the bottom of page 409:

> "**They having appealed from the decision, it would be against all reason and principle to permit them to proceed with the execution of it pending the appeal.**"

That is they were estopped.

The decision of this court in the *Bronson* case that an appeal by a party from an order in its favor which it sought, estops it from claiming that it may insist that the order may be executed during its appeal, is not dicta. This court held squarely that on two equally valid grounds the district court could not proceed with execution of its judgment while the successful party which sought it was appealing from it.

Pages 6 to 9 of the Respondent's So-called "Reply" Brief

Section Numbered 3.

Reconstruction v. *Prudence*, 311 U. S. 579. Of course, we know that the facts in the *Prudence* cases (petitioners' brief pages 30 and 31) and in this *Meshberger* case are not alike. **Yet the same principle is equally applicable to both cases**. If it is a question of diligence which the respondent would claim to be in the one instance and not in the other, it was not shown in the Prudence cases, because for many years prudent practitioners had diligently provided against

the possibility of having their appeals dismissed by taking alternately two appeals, one in the district court and the one in the appellate court.

Respectfully submitted,

ELMER MCCLAIN,
Lima, Ohio
Counsel for the Petitioners.

Washington,
April 17, 1944.

MAY 20 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1943

No. 754

RUFUS MESHBERGER and LELIA B. MESHBERGER,
Petitioners,

vs.

THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION

ELMER MCCLAIN,
Lima, Ohio

SAMUEL E. COOK,
Huntington, Indiana,
Counsel for Petitioners.

UNITED STATES LAW PRINTING CO., PHONE LAKEVIEW 6581, CHICAGO, ILL.

Supreme Court of the United States

OCTOBER TERM 1943

No. 754

RUFUS MESHBERGER and LELIA B. MESHBERGER,
Petitioners,

vs.

THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION

To the Honorable Chief Justice and Associate Justice of the Supreme Court of the United States:

Counsel for the petitioners respectfully move the court to state the reasons why their petition for certiorari was denied, and in support thereof present the following reasons:

1. After the record, petition and supporting brief of the petitioners, the so-called "Reply" brief of the respondent, and the reply brief of the petitioners had been submitted to the court, the only information coming to the petitioners or their counsel as to the result of said submission was a telegram from the clerk stating that certiorari was denied on May 1, 1944. If any reason was stated by the court, counsel for the petitioners do not know what it was.

2. It is a common complaint of the bar of this court that counsel for the parties involved in a petition for certiorari which is denied is usually unable to discover why it was denied. So far as the contacts and observations of counsel for these petitioners go such complaint is universal among the bar but seldom, if ever, expressed to the court.

3. It is conceivable that in any given case a petition for certiorari may be denied, not because of the substance of the case presented, but merely because it has not been properly presented, or merely because the time is not ripe for presentation. If the reason were known, the defect could often be remedied.

4. In *Gypsy* v. *Escoe*, 1927, 275 U. S. 498, this Court in denying certiorari plainly informed the parties what was wrong procedurally and how to right it. But in the vast majority of instances no statement except "certiorari denied" is announced.

5. Where certiorari is denied because of the substantive law, it would seem that the parties and their counsel immediately concerned should know what point has been the basis of the denial of a review in this court, and it would

seem that the public interest would require that the public generally have the same information.

6. Until counsel for a petitioner for certiorari knows why certiorari is denied, it is impossible to know what the denial of certiorari means—whether the court deems the matter was not properly or timely presented, or whether it is deemed that the judgment complained of is right. Yet the bar has frequently been cautioned that denial of certiorari is not to be taken as approval or affirmation of the judgment below.

7. In nearly all cases the denial of certiorari means that the petitioner's rights which are involved are lost forever—unless as in *Kalb* v. *Feuerstein*, 1941, 313 U. S. 599, his counsel takes the risk of attempting to divine the reasoning of the court and after a total of eight years of litigation finally he attains the object of his original recourse to the federal courts.

8. In some instances it turns out that if the petitioner whose petition for certiorari was denied had kept his case in court, he would finally have succeeded, because later the precise question presented by his denied petition was subsequently decided in his favor. *In re Richmond*, 1938, 303 U. S. 657. *Wright* v. *Union Central*, 1938, 304 U. S. 502. *Wright* v. *Logan*, 1942, 315 U. S. 139. *John Hancock* v. *Bartels*, 1939, 308 U. S. 180.

9. In farmer debtor cases, the loss of his case, more often than in most litigation and practically always, means that the petitioner is destined to become a landless farmer. Usually the farm involved is all he has, except his family, his experience, and his implements, a circumstance which leads him inevitably into the class of tenants, and increases the prevalence of absentee farm ownership.

10. These reasons involve enormous social consequences which Chapters 8, 9, 10, 11, 12, 13, 14, and 15 of the Bankruptcy Act were designed to prevent. When such consequences, which come about almost imperceptibly, have fully developed into a set social change, there is no remedy which recourse to the courts can administer.

It is for all these reasons, and many others which a more extensive consideration of the subject would disclose, that this court is requested to state the reason, or reasons, why the petition for certiorari in this instance was denied.

Respectfully submitted,

ELMER MCCLAIN,
Lima, Ohio

SAMUEL E. COOK,
Huntington, Indiana
Counsel for the Petitioners.

Lima, Ohio
May 16, 1944.

Supreme Court of the United States

OCTOBER TERM 1943

No. 754

RUFUS MESHBERGER and LELIA B. MESHBERGER,
Petitioners,

vs.

THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING.

ELMER MCCLAIN,
Lima, Ohio

SAMUEL E. COOK,
Huntington, Indiana,
Counsel for Petitioners.

UNITED STATES LAW PRINTING CO. PHONE LAKEVIEW 6881. CHICAGO, ILL.

Table of Cases.

	PAGE
Carter v. Kubler, 1943, 320 U. S. 243	7
Harris v. Zion, 1943, 317 U. S. 477	7
John Hancock v. Bartels, 1939, 308 U. S. 180	5
Louisville v. Radford, 295 U. S. 555	4,5
Pfister v. Northern Illinois, 1942, 317 U. S. 144	6
Union Joint Stock Land Bank v. Byerly, 1940, 310 U. S. 1	5
Wright v. Union Central, 1940, 311 U. S. 273	5
Wright v. Vinton, 1937, 300 U. S. 440	5
Wright v. Logan, 1942, 315 U. S. 139	5

Supreme Court of the United States

OCTOBER TERM 1943

No. 754

RUFUS MESHBERGER and LELIA B. MESHBERGER,
Petitioners,

vs.

THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners respectfully present their petition for rehearing.

As stated in the motion requesting the court to state the reasons why certiorari was denied, which is presented with

this petition for rehearing, the petitioners do not know why their petition was denied. Consequently until they are informed, they must proceed in the best way they can under the existing circumstances.

The legislative branch of the United States government has done its part under its constitutional power to legislate on the subject of bankruptcies by enacting Chapters 8, 9, 10, 11, 12, 13, 14 and 15 of the Bankruptcy Act as codified at 11 U. S. C. The provisions of these chapters are permanent except those for municipalities and for farmer debtors which have been extended to 1946. The last two times that Section 75 was extended it was done for the purpose of giving time for a thorough revision of it. There is no doubt that it will be made permanent.

This legislation for the relief of individual, farmer, railroad, municipal, corporate, realty owner, wage earner and ship owner debtors greatly enlarged the exercise of the bankruptcy power delegated to the Congress in the Constitution.. The Act of March 3, 1933, being Chapter 8 of the Bankruptcy Act, which initiated the extension of the exercise of the granted power, was enacted upon the recommendations of the President, of the Chief Justice, and of the Department of Justice. Those eight chapters now provide adequate legal machinery for the relief of debtors without the surrender of their property to creditors. This is accomplished by transferring the lien and claims of creditors to the value of the debtor's property in place of permitting the property itself to be transferred to creditors. It is indeed a great progress from the original Roman bankruptcy law which permitted the creditors to dismember the body of their unfortunate debtor.

The age-old procedure of making secured loans to the

owners of property and taking the property from them when values are low has thus been legislatively extinguished. It was the legislative purpose, which is inviolable under the constitutional power exercised by the Congress, to forestall what exists in China today. That nation of vast potential aggregate wealth and resources lies relatively impotent and divided against itself because its small farmers have been dispossessed of their lands by grasping absentee money lenders who have seized mortgaged farm lands.

Had it not been for the enactment of these eight new chapters the producing property of our people would by this time have been in the hands of new, and mostly absentee, owners and the United States of America would be on the Chinese Road. It is only at the beginning of the turning that such a social and political calamity can be averted.

But our tripartite government of checked and balanced legislative, executive and judicial powers does not execute its will by the mere legislation of a national policy. It remains partly or wholly impotent without the cooperation and support of the judiciary. Against the first attacks, by those who never learn and never forget, upon the new debtor policy promulgated by the legislative branch of the government, it was wholly sustained fundamentally by this court and accepted in practice by creditors as to every class of debtors except alone farmer debtors.

The farmer debtor law as it was first enacted, as Section 75 (a) to (r), was an innocuous bit of legislation which by itself accomplished nothing but a slowing down of the inevitable foreclosure and seizure of the farmer debtor's farm. During the slow-down all the farmer debtor could do was to make a proposal to his creditors which they could accept or reject. It was only when the farmers insisted

that there should be no further debtor legislation for railroads and other corporate debtors until some teeth were put into the farmer debtor law, similar to those already in the corporate debtor laws, that the first Section 75 (s) was enacted.

From that time, that is from the passage of the first Section 75 (s), to the present moment the mortgage holders, and their sympathizers, have unceasingly contested the farmer debtor law. The federal land banks which were established to "solve the farm debt problem" and which have constantly been supported by the government, have been the leaders and encouragers of all farm mortgage holders who resist the constitutional legislative power of the nation. With their large, permanently retained legal staffs they have lead the attacks for all farm creditors.

Nothwithstanding the essential similarity in effect of the original Section 75 (s) to the corporate and railroad debtor laws, it was thrown out in *Louisville* v. *Radford,* 1935, 295 U. S. 555, chiefly because it deprived the mortgage holder of its "right to have a public sale at which it could bid." The attack against that enactment was secretly financed by the Association of Life Insurance Presidents none of whose members or their insurance companies, was party to the suit directly or indirectly. It was disclosed several years later that they spent in that battle to defeat the farmer debtor law the sum of $63,790.63, which was about fourteen times what the farm in that case was worth. Investigation of Concentration of Economic Power, Temporary National Economic Committee, 1939, 76th Congress, First Session, pages 4345 to 4555 and Exhibit No. 963 at page 4750.

After the Congress enacted the present Section 75 (s) to succeed the first, and put in it at Section 75 (s) (3) the provision that a farmer debtor might redeem his farm at its appraised value provided that the court must order a public sale if any secured creditor in writing requested it, this court in *Wright* v. *Union Central,* 1940, 311 U. S. 273 held that no such sale could be held until the farmer debtor first had an opportunity to redeem his farm at its value. That decision thus overruled the holding in *Louisville* v. *Radford,* 295 U. S. 555, that a public sale at which it could bid was one of the "rights" of a mortgage holder of which he could not constitutionally be deprived.

When the present Section 75 (s) came before this court on the question of its constitutionality, it was sustained in *Wright* v. *Vinton,* 1937, 300 U. S. 440, with, however, a suggestion in the text and in Note 6 at page 462 of the opinion that for lack of "a reasonable hope" or for lack of "good faith" a farmer debtor proceeding might lawfully be dismissed. That construction was reversed and disapproved in *John Hancock* v. *Bartels,* 1939, 308 U. S. 180, by the whole tenor of the opinion and expressly in Note 3. Also see *Wright* v. *Logan,* 1942, 315 U. S. 139.

These fundamental judicial determinations have not deterred the mortgage holders from continuing their unremitting attempts to break down the purpose of the law in its operation. In *Union Joint Stock Land Bank* v. *Byerly,* 1940, 310 U. S. 1, against the vigorous dissent of three Justices who held that the decision defeated the purposes of the law and provided a ready means of circumventing it, it was held that though a bankruptcy court, without any notice or hearing unlawfully purported to authorize a state court to proceed in foreclosure, the act of the state court

became valid, even though the farmer debtor knew nothing of the act of the bankruptcy court or of the act of the state court.

In *Pfister* v. *Northern Illinois,* 1942, 317 U. S. 144, the decision of the lower courts that a district judge has no jurisdiction to consider a petition for review after the lapse of the ten days named in Section 39(c) of the Bankruptcy Act was reversed. Farmer debtors think it significant that the same district court, by the same judge, had previously held that it had such jurisdiction. Although the lower courts were so reversed on the main legal issue, a century old precedent, repeatedly and uniformly observed by federal courts and approved by this court, was changed so that whether a court "entertains" a petition for rehearing and consequently "whether time for appeal would be enlarged or not would depend upon what the order showed the court did." Quoted from the opinion at page 151. That is, an application for rehearing of an order is filed at the price of learning whether time for appeal has expired or been extended, only by the content and wording of the subsequent order denying it. For in nearly every instance the thirty days for appeal will have expired before the conciliation commissioner has acted upon the application for rehearing. In other words it is the ultimate form in which the conciliation commissioner puts his denial of an application for rehearing which discloses whether he has "entertained" it and this is true even though, as in that case, he state in his finding that he had fully considered the whole proceeding.

The practical result of this decision was to permit a conciliation commissioner to violate Section 75 (s) (2) by charging $6375.00 rent for 2 years, 8 months, 13 days of

possession of an 80 acre, 20 cow, dairy farm; then order an additional $6375 to be paid within the same time, a total of $12,750; and then order the cows, feed and farm implements to be sold.

Again in *Harris* v. *Zion,* 1943, 317 U. S. 447, over the vigorous dissent of three Justices, it was held that the provision of Section 75 (r) that a personal representative of a deceased farmer is a farmer is dependent upon the law of the state despite the fact that while Section 74 was amended to require state authorization, yet Section 75 (r) was twice thereafter amended without requiring such authorization.

Again in *Carter* v. *Kubler,* 1943, 320 U. S. 243, where it was held that the district court disregarded a vital part of the valuation evidence by throwing out of consideration a $5800 previous valuation by the same court on the ground that it related only to "taxation purposes", yet it was held that the value set without such evidence was binding.

Counsel for the petitioners most respectfully present these facts, though none the less earnestly, because they illustrate the statement that while the other debtor laws embodied in the eight chapters of the Bankruptcy Act are accepted fully in practice, as well as in principle, we still have the unremitting and relentless opposition of the holders of mortgages on farm lands to the practical operation of Section 75. Unless the results of the legislation which created Section 75 are forthcoming in the actual adminis-

tration of farmer debtor cases there is no effective farmer debtor law.

What is involved is apparent when it is considered that in five years 453,000 farmers lost their farms through foreclosure, that is, one in twelve. And within a single year one in every nineteen was completely so wiped out. Address of the Administrator of the Office of Price Administration, February 8, 1944.

A statement made to a Congressional Committee which was printed and later published in the press, that a single corporate mortgage holder had accumulated several millions of dollars from resale of seized mortgaged farms has not been publically denied. Hearings, Special Subcommittee on Bankruptcy of the Committee on the Judiciary, 75th Congress, 2nd and 3rd Sessions, December 18, 1937, page 56.

What is not equally apparent is disclosed only by actual contact with farm realties. The ownership by farmers of the lands they own is the absolute necessity of a strong, virile nation. The number of court foreclosures does not adequately measure the drift to farm tenancy. For every single foreclosure in court there are scores of indebted farmers who are forced to surrender their titles through the intimidation of cunning and relentless mortgage holders. "Sign this deed and we will hold it for you and give you the time you ask; otherwise we will foreclose and put you off" are familiar words.

The history of the unceasing attempts to defeat the purpose of Section 75 by farm mortgage holders is an instance of the "trickle down" economic theory in reverse. Utterly defeated in their attempts to wipe the law off of the stat-

ute books, they have concentrated on preventing the farmer debtors from achieving the fruits of the law. Whenever a farmer debtor succeeds in maintaining his case through the three year stay he faces a strenuous contest for his right to redeem his farm at its value. If the mortgage holder can force the farm to a sale, then the law is utterly emasculated. The mortgage holder has won the battle. He may bid the full amount of his claim without paying down a cent of money and thus force an inflated fictitous value for redemption at a price much greater than if the farmer debtor had capitulated before he ever invoked the farmer debtor law. Thus farmers are "taught a lesson"—not to expect that Section 75 will aid them. New devices are constantly being employed to defeat the law.

What Has Happened in This Meshberger Case.

The device in the present instance is this:

1. The mortgage holder moves the court to set a valuation and time for redemption.

2. The court by order fixes the value and sets a time.

3. The mortgage holder which sought the order contests it by petition for review and appeal.

4. By the time the appeal is determined the time has expired.

If opportunity were afforded and the question would be answered, we would wish to ask what a farmer debtor is to do when confronted by exactly this situation. There is no practical answer that will show the farmer debtor how to save his farm by paying its statutory valuation. The only answer is that he must redeem at the accumulated fictitious paper price fixed by the bid of the mortgage holder plus interest as set by the next to the last sentence of

Section 75 (s)(3). He is thus worse off than when he first invoked Section 75.

If it should seem that there is undue insistence on this subject we repeat that there is intended no disrespect for the court but we would not minimize the earnestness with which it is presented. The amount, either of land, or of money immediately involved, is no indication of the hundreds of thousands of farmers and of the hundreds of millions of dollars that are involved in every farmer debtor case presented to this court.

The petitioners therefore pray that the denial of their petition for certiorari be reconsidered and that the petition be granted.

Respectfully submitted,

ELMER MCCLAIN,
Lima, Ohio

SAMUEL E. COOK,
Huntington, Indiana
Counsel for the Petitioners.

Lima, Ohio
May 17, 1944

Certificate of Counsel.

I certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ELMER MCCLAIN.

I

SUMMARY OF ARGUMENT

It appears the argument that Congress never gave the Supreme Court any power to reject this appeal and no power to refuse to review the judgment of the Circuit Court of Appeals, as expressly commanded by that Body, is more clearly set forth beginning with paragraph 10 page 15 of this petition. Hence, we will bring that argument back to the head of this petition and restate it as a "Summary of Argument," as follows:

10. The lawyer is an officer of the Courts. He has no choice but must state the law as he thinks it is. If he shrinks and does not do that he is neglecting his duty to the citizen he happens to represent, and in this case to the Supreme Court of the United States.

11. In conclusion permit us to state: That Counsel firmly believes this Court, in refusing to obey the command of Congress, has committed gross error in this: Where did the Supreme Court get the power to refuse to review this judgment? What is the source of its power?

(a) This Court stated in Re Graham 10 Wall. 541 (19 L. Ed. 981) the following:

> "Our jurisdiction is specific and limited. It is defined by the Constitution and laws of the United States. We can exercise none but what is conferred by one or the other." (10 Wall. 541.)

(b) The author of the Digest of the Reports of the Supreme Court of the United States puts it in this language:

> "The United States Supreme Court can exercise no

jurisdiction, except what is conferred by the Constitution and laws of the United States." (110 Wall. 541.)

(c) The Supreme Court held in Cohens v. Virginia 6 Wheat. 264, in the words of the author of the Reports as follows:

> "The United States Supreme Court has no more right to decline the execution of jurisdiction which is given, than to usurp that which is not given."

(d) Chief Justice Marshall in Fisher v. Cockerell, 5 Peters 248, stated on this point as follows:

> "As this Court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon it." (5 Peters 248.)

Thus it derives all of its power from the Constitution and the laws of Congress.[1]

12. Tell us where there is any laws of the United States which authorized this Court to decline to review this judgment as commanded by the Congress in Section 24 of the Chandler Bankruptcy Act of June 22, 1938. Congress never gave this Court the power to defeat this Act by refusing to review this judgment and never will. To contend it gave this Court such a power as that is absurd and unreasonable. Neither has the Constitution given it such a power. It has some inherent powers but it will not be claimed that it could use that inherent power to defeat an Act of Congress providing for the review of this judgment. No never. That would be a monstrous proposition. If the Constitution or

[1]We regret that time would not permit of a more thorough examination of the decisions of the Supreme Court, as to its powers and duty in a case like this.

If it happens that this is the first time this question has been raised or presented, in this Court, its decision will be of far-reaching importance in the days to come.

We are confident that the Court has erred in refusing to review the judgment as commanded by Congress.

The law provides a remedy for every wrong. That is why the petition for a rehearing lies here. It is the only remedy and hence must be applied.

the laws of the United States did not give it such a power it follows that it never had such a power at all. Then where would it get such a power. If it had no such power, the order of this Court of May 1, 1944, refusing to review this judgment, is absolutely null and void and does not bind the Debtors. The language of the order, "The application for appeal is also denied," is confusing and void for the reason this Court is not required to allow the appeal. That is allowed by the Act of Congress of June 22, 1938. There is no power on Earth that can defeat said appeal and review. The failure of the Court to mention anything about the review of the judgment, does not change the situation. The Court should have mentioned it. It is in the Act and the Act is a part of the order in question. The failure of the Court to mention it will be taken as a decision against the Debtors and as a refusal to review the judgment.

That ends this story. The order of May 1, 1944, that the appeal was denied means nothing. It does not come within a mile of defeating the appeal, provided for by the Supreme Law of the Land. That stands like a stone wall and the Court might decline to grant it every day but that would not affect it at all. The appeal, as of right, will go on, no difference what this Court may think of it, until Congress repeals said Section 24 of the Chandler Bankruptcy Act. The failure of the Court to mention what it would do about reviewing the judgment amounted to a refusal to review that judgment. The Court should set aside the order as to the appeal as void, and indicate that it would follow the Act of Congress and review the judgment below.

Respectfully submitted,

SAMUEL E. COOK,
Huntington, Ind.,
ELMER MCCLAIN,
Lima, Ohio,
Counsel.

May 18, 1944.

SUBJECT INDEX OF PETITION FOR REHEARING

Page

(1) Summary of argument..... 1

(2) Application for appeal denied..... 2

(3) Action of Court not like certiorari..... 2

(4) The order of May 1, 1944, is a judgment. What else could it be?..... 2

(5) The order was like a dismissal and that gives right to this petition..... 2

(6) This is the only Court that can review it..... 2

(7) Their right to redeem was thrown out the window. 2

(8) In the Kalb case this Court held this remedial Act was the Supreme Law of the Land which all Courts, State and Federal must observe..... 2

(9) The Chandler Act providing for this appeal and review is a part of the Bankruptcy Act..... 2

(10) To refuse to review, defeats redemption of land and all is gone..... 2

(11) The Creditor filed no opposing brief, hence admitted petition 3

(12) Neither did the Court state the grounds on which it denied the petition for review..... 3

(13) If that is according to the Rules they should be changed 3

(14) This is an appeal and for review, as a matter of right, independent and in addition to certiorari and imperative 4

(15) Section 24 (c) of the Chandler Act settles the question of appeal and review..... 5

(16) It is set out in full..... 5

(17) No one can question the power of Congress to enact this law for an appeal..... 5

Page

(18) Only Congress can impair a contract. States delegated Bankruptcy power to Congress..... 5

(19) That power in class with power to declare war, etc. 5

(20) Then at close of enumeration added to make all laws necessary to carrying the powers in execution. 6

(21) No one has questioned Chandler Act, that it is void. 6

(22) It is the law now and no Court can wipe it out.... 6

(23) This was an appeal in proceedings in Bankruptcy.. 6

(24) The Court must review the judgment. It can not abdicate or renounce that power..... 6

(25) To refuse to review would be arbitrary, capricious, and null and void..... 6

(26) Debtors ask for "bread and must not be given a stone" 6

(27) This clause (c) providing for appeal and review is the Supreme Law of the Land and binds this Court. 6

(28) This Court may make Rules but it cannot defeat this Act 7

(29) A great President said: "Our Constitution does not contain the absurdity of giving power to make laws and another power to resist them"..... 7

(30) This appeal is one of the means adopted by Congress to execute its powers over Bankruptcy proceedings and it is the judge of the means it will employ to execute its Constitutional powers..... 7

(31) Rule 38 (5) providing for certiorari, does not apply to this appeal and review..... 7

(32) This is a proceeding in Bankruptcy, hence the Act applies 8

(33) As to the wisdom and propriety of this Act, it is for Congress to consider and not this Court..... 8

Page

(34) If this appeal and review is defeated by the Court it would be an attempt of the Judicial Department to defeat this Act of Congress..... 8

(35) The Court knew these Debtors were appealing under this Act..... 8

(36) This Act only applies to appeals in Bankruptcy... 9

(37) Even if allowing this appeal would increase the business of this Court, it would be no reason why it should not be enforced..... 9

(38) The language of clause (c) is plain..... 11

(39) Congress intended an appeal as defined by Bouviers—"The removal of a cause from a Court of inferior to one of a superior jurisdiction for the purpose of obtaining a review and retrial"..... 11

(40) "This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt"..... 11

(41) "* * * to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property * * * There is no constitutional claim of the creditor to more than that. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress." Wright v. Union Central, Dec. 9, 1940, 311 U. S. 273..... 11

(42) It is governed by the Rules of Equity..... 12

(43) It is the business of the Courts to so construe the Act as to suppress the mischief (Loss of American Farms) and advance the remedy. That was not done here..... 12

(44) The result of the action of the Court will deprive the Debtor of the benefits of the Act and the right to save their home, and work an awful injustice... 13

Page

(45) No Court has the right to decide wrong..... 13

(46) The sole duty of the Court was to review this judgment—the appeal was given by Congress..... 13

(47) To review a judgment means to re-examine it judicially. Every part of the judgment must be examined 14

(48) The order denying an appeal and review is null and void and set aside..... 14

(49) The appeal was properly taken..... 15

(50) Congress intended an appeal and review as defined by Bouvier: "The removal of a cause from a Court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and trial".. 16

(51) The Court of Appeals sought to overrule the Supreme Court in the Bronson Case (17 L. Ed. 616) 17

(52) The Court erred in allowing the Creditor to recover the $450.00. The evidence showed the Creditor owed that to the Debtors..... 18

(53) The Court erred in allowing the Creditor to recover the rent of $843.00 in hands of the Referee. The Ezell case holds no part of the rent goes to the Creditor. All it gets is the appraised value of $6,000.00. In re Ezell, 45 Fed. Supp. 164..... 19

The petition from No. (10), page 15, is taken back and repeated as Summary of Argument I, page i.. 1

Respectfully submitted,

SAMUEL E. COOK,
Huntington, Ind.,

ELMER MCCLAIN,
Lima, Ohio,
Counsel.

May 18, 1944.

TABLE OF CASES CITED

	Page
Bouvier's Law Dictionary, Vol. 1, p. 127	11
Brandenburgh on Bankruptcy (4th Ed.), Sec. 10, p. 27	12
Vol. 1, Blackstone (Star, p. 87), bottom p. 53	12
Bronson v. LaCross (17 L. Ed. 616), 1 Wall. 405	17
Chandler Act, Sec. 24 (a), (b), (c), p. 12	3-5, 10, 15
Chandler Act, Sec. 24, p. 17	16
Cohens v. Virginia, 6 Wheat. 264	20
11 U.S.C.A., §47 (a), (b), (c)	8
Fisher v. Cockerell, 5 Peters 248	20
In re Ezell, 45 Fed. Supp. 164	19
Kalb Case, 308 U. S. 433	2
McCulloch v. Maryland, 4 Wheat. 316	7
Norman v. Baltimore, 294 U. S. 240	5
In re Graham (19 L. Ed. 981), 10 Wall. 541	19
2 R. C. L., p. 100	9
Wright v. Union Central, 311 U. S. 273	11

Respectfully submitted,

SAMUEL E. COOK,
Huntington, Ind.,

ELMER MCCLAIN,
Lima, Ohio,
Counsel.

May 18, 1944.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

RUFUS MESHBERGER AND LELIA B. MESHBERGER, Husband and Wife, *Debtors, Appellants,* v. THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY, *Respondent.*	No. 754

In Bankruptcy Under Section 75—Subsection (s)

DEBTOR'S PETITION FOR REHEARING

TO THE HONORABLE HARLAN FISKE STONE, CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF SAID COURT:

IV

Come now Rufus Meshberger and Lelia B. Meshberger, husband and wife, and petitions said Court to grant a rehearing in said cause for the following reasons:

1. On May 1, 1944, said Court entered an order in said appeal as follows:

"The application for appeal is also denied."

This action of the Court in an appeal like this, is not like refusing certiorari. This was an order refusing to review the judgment below as commanded by the Act of Congress. The latter commanded the Court to review the judgment of the Court of Appeals. There is no command for certiorari. It entered an order refusing to do so. These Debtors are as helpless as a child to compel the Court to observe this Act. The order is a judgment but a void one and this gives the right for a rehearing. The denial of the petition to review was a dismissal and an order of dismissal is a judgment. The order must be something and it cannot be anything else but a judgment. This Court is the only power on Earth that can review said judgment and save this home. In that view of it, it would be absurd for the Court to claim this order was not a judgment. It ended the case up to that time. To where will the Debtors go for relief except to this Court. Their petition for the right to save their home was cast out of the window.

In the Kalb case, January 2, 1940, this Court held the body of this remedial Act was the Supreme Law of the Land, "Which all Courts—State and Federal—must observe." The Chandler Act above is a part of the Bankruptcy laws enacted by Congress for the relief of American Farmers and all Courts must observe this provision for appeal. It would not be a full law without a provision for appeal and review.

Under the American way, the Debtors had the right to have an order entered showing the reasons for refusing to review the judgment as commanded by Congress and to ask for a rehearing. If this Court declines to enforce this right to redeem it will defeat their right to redeem the land at its appraised value and all is gone.

2. Previous thereto the Debtors had filed a second paragraph of petition for an appeal, as of right, in said cause from the Circuit Court of Appeals for the Seventh Circuit, with an assignment of errors and a supporting brief, and gave notice to the Creditor. That perfected the appeal. The Court had nothing to do with giving the appeal. The Act of Congress gave the appeal. The sole thing the Court was required to do was to review the judgment below and carry out the will of Congress. To deny a petition to review this judgment was not reviewing it at all.

3. Proper notice of appeal was given to the Respondent, but it paid no attention to that and did not even file any opposing brief as required by the Rules. It thereby admitted the petition was true. Neither did the Honorable Court state in its judgment the grounds upon which it denied their petition. If that is according to the rules they should be changed. A word or so would have rendered a great service to Debtors' Counsel and enabled him to show the Court wherein it had erred. As it is he must walk in the dark. He was entitled to walk in the light.

4. There was no reason why the Court should have denied the petition and refused to review the judgment of the Circuit Court of Appeals. We will show it had no power whatever to do that. Counsel will have to guess as to why the Court denied the petition and refused to review the judgment of the lower Court. Hence, it will require him to argue three supposed grounds upon which the Court might have based its ruling. Keep in mind, there was no reason which authorized it to refuse to obey the will of Congress and refuse to review said judgment below. Supposed grounds:

(1) That Congress in the Chandler Act Section 24 (a), (b), (c) and Section 47—11 U. S. C. A. (a), (b), (c) did not

provide for an absolute appeal, as of right, from the judgment of the Court of Appeals to the Federal Supreme Court in cases of this kind and hence the petition for appeal should be denied. In that the Court greatly erred.

(2) That Congress in said provisions above, did provide an absolute appeal, as of right, and the appeal here was not properly taken: That is, the petition was defective and did not bring the case within these provisions of said Act.

(3) Or the case presented did not show the Debtors were entitled to any relief on the merits of the case. These in their order.

(1) Did Congress provide an appeal, as of right, and require this Court to review the judgment below?

1. It will be admitted that the original Section 75 of the Bankruptcy Act of March 3, 1933 did not provide for any appeal to the Supreme Court in Bankruptcy cases. It contained only the substantive provisions for the relief of the "distressed farmer." The Act which gives an absolute appeal is as stated above the Chandler Act enacted June 22, 1938. In effect September 22, 1938. Hence, it was in effect when the judgment herein was entered on December 2, 1942. The second clause (b) referring to appeals in proceedings in bankruptcy provides:

> (b) "Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal." Chandler Act, June 22, 1938, Sec. 24(b)—11 U. S. C. A. Sec. 47(b).

2. Congress meant by that language to broaden the right of Appeal in bankruptcy proceedings; to provide for an absolute appeal, which should exist without any allowance of an appeal, as in certiorari, and that it was an appeal as a "matter of right" independent and in addition to a peti-

tion for certiorari and did not have to be allowed by any Court. When Congress gave this right it intended the Court must review the judgment below. It is imperative. There is no choice about it and must be obeyed, "though the Heavens fall."

3. The next section (c) settles the question beyond all doubt. It is as follows:

> "(c) The Supreme Court of the United States is hereby vested with the jurisdiction to review judgments, decrees and orders of the Circuit Court of Appeals of the United States . . . in proceedings in bankruptcy under this act in accordance with the provisions of the law of the United States now in force or such as may hereafter be enacted." Chandler Act, Sec. 24(c)—11 U. S. C. A. Sec. 47(c).

This is as clear as the Sermon on the Mount. Can any one question the power of Congress to enact this law and thereby provide for an appeal as of right? No, all power to impair the obligation of contracts was denied to the States and the latter delegated all of such powers to Congress, and in enumerating its great powers added: "To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States." Sec. 8 Clause 4—Constitution.

In Norman v. Baltimore 294 U. S. 240 (79 L. Ed. 885) this Court held this power (to cancel or discharge debts) was among the greatest powers of the Congress and is in the class with the power "to coin money and regulate the value thereof" or "to declare war" which costs the lives and property of our citizens. To reach the proper conclusion, we must consider the question in the instant case as a bankruptcy question. Like Chief Justice Marshall observed in the McCulloch case: "In considering this question then,

we must never forget that it is a Constitution we are expounding."

At the close of the enumeration of these powers the Constitution also gave Congress the power—"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers." No litigant has ever claimed this clause, (c) of the Chandler Act, is unconstitutional or void. No Court has ever so held it. It stands today as a living part of the Bankruptcy Act and this nor no other Court has the power to wipe it out or blot it from the Statute Books. It must be enforced. It must be enforced, or the whole remedial Act for the relief of the "distressed farmer" will be only a half law and hence a sham.

4. That clause certainty applies to the case at Bar and provides for an absolute direct appeal, as a matter of right, from the Circuit Court of Appeals to the Federal Supreme Court, in "proceedings in Bankruptcy," without any action by the Court, and also provides that that Court must review said judgment of said Court of Appeals. The Supreme Court is intended to enforce the will of the Congress. For all legislative power is vested in that great body. If it is charged with the duty to review this judgment, it must exercise that power. It cannot refuse to review. It is the only body charged with that duty. It can not abdicate, renounce or surrender that power, or shift that duty. They are asking "for bread and must not be given a stone." They are helpless. To refuse to review it would be arbitrary, capricious and null and void.

5. The action of Congress made the appeal the Supreme Law of the Land. All officers of the United States shall be bound by oath or affirmation to support the Constitution and the laws made under it. Many cry Constitution! Consti-

tution! and yet oppose every Act of Congress enacted to carry it out.

It is conceded this Court has certain powers to make rules for the conduct of and to expedite the business before it, but no one will contend that it has the power to make a rule which would nullify or overthrow the Supreme Law of the Land. Hence no Rule of this Court could defeat this appeal and review created by this Congress. All such Rules would have to yield and give way to the Supreme Law of the Land.

A great President said on this point:

> "Our Constitution does not contain the absurdity of giving power to make laws and another power to resist them."

6. This Act providing for this appeal, as of right, and providing this Court has the power to review this judgment, means this Court must execute it. It is one of the means adopted by Congress to execute its Constitutional powers over the "subject of bankruptcies." Congress is the judge of the means it will employ in executing its Constitutional powers. No court can review that power.

McCulloch v. Maryland, 4 Wheat. 316.

7. Rule 38—(5) of this Court that "A review on a writ of certiorari is not a matter of right but of sound judicial discretion"—will stand as the Rule in all appeals other than in Bankruptcy. But in an appeal in proceedings in Bankruptcy as here, the above Chandler Act applies and expressly provides for an absolute appeal and review of the judgment in a proceeding in Bankruptcy. This statutory appeal is an absolute appeal and review and does not need to be allowed by any Court but can "be executed by an appeal and in the form and manner of an appeal." Con-

gress and not the Court gives the right of appeal. All this Court has to do with it is to review the judgment below. That means the litigant shall file the transcript or record in the Supreme Court, attach an assignment of errors and a supporting brief and then gives the opposite party notice that such papers have been filed with the same. The record shows this is a proceeding to redeem the land at its appraised value. It is one of the steps in the Administration of the Act. Hence, it is a "proceedings in Bankruptcy."

8. As to the wisdom, propriety or necessity for such an appeal and review in Bankruptcy proceedings, different from the Rule as to certiorari, that was a matter wholly for the consideration of Congress to decide, and not for the Courts. If that appeal and review can be defeated by the Courts refusing to enforce it that would amount to the Judicial Department of our Government encroaching upon the powers of the Legislative Department, and would be an attempt to make a law to defeat a law of Congress.

9. At this point an idea came which was not thought of when starting the preparation of this petition for a rehearing. It is this:

On page 17 of the Debtors' petition for appeal they set out Section 24 (a), (b), and (c) of the Chandler Bankruptcy Act of June 22, 1938, and Sec. 47 11 U. S. C. A., (b) and (c) of September 22, 1938, under the head of "How shall this appeal be taken?" This informed the Court that the Debtors were appealing under said sections (b) and (c).

10. A strange thing happened. The Court on May 1, 1944, notified Counsel for the Debtors as follows:

"The application for appeal is also denied." But was silent as to the review.

From this, the Court knew the Debtor had taken an

appeal and had based it on these two clauses of the Chandler Act. Thus the Court in denying the petition and thereby refusing to review, must have meant to state that the Debtors had taken an appeal for a review in the usual sense of that term and that it was based upon said clauses (b) and (c) of said Act. When it denied the appeal that amounted to holding clause (b) and (c) of said Act did not provide for such an appeal and review in Bankruptcy cases or that the Rules of the Court requiring the consent of the Court applied. The appeal under said Chandler Act was an appeal as of right and hence could not be defeated by the Rules of the Court. The Court was required to review the judgment and it could not stop the appeal or refuse to review the erroneous judgment below. Of what avail would it be for Congress to take the time to enact this provision for an appeal and review if the Court could disregard it and refuse to enforce it.

In denying the petition for an appeal the Court must have meant this section (c) does not provide for an absolute right of appeal and review of the judgment below. Why was the review not mentioned in the order? This will be explained later.

A law not enforced or applied is a "dead letter" and no law at all, and is an instrument of confusion and injustice.

11. As stated above this Act for an appeal and review only applies to cases in "proceedings in Bankruptcy." If this appeal is a matter of right and the Court must review the judgment below and this should increase the business of this Court, that would be no reason why it should not be enforced. That was a question for Congress to settle and this Court would have nothing whatever to do with it. However, the law favors the right of appeal. (2 R. C. L. p. 100.)

12. Let us turn back and again notice the language of this Act: It states:

> "The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees and orders of the Circuit Court of Appeals of the United States . . . in proceedings under this Act in accordance with the provisions of the laws of the United States, now in force or such as may hereafter be enacted." Sec. 24 (c) Chandler Act, June 22, 1938 (Sept. 22, 1938) Clause (c) Sec. 47 (11 U. S. C. A.)

It states:

> "In proceedings under this Act in accordance with the provisions of the laws of the United States now in force . . ."

In construing an Act every part of it must be read and considered.

Applying that rule, clause (a) of the Act provides appeals can be taken—"In proceedings in Bankruptcy." Hence the clause (c)—"Under proceedings under this Act" means "In proceedings in Bankruptcy." Then clause (c) states the appeal can be taken—"In accordance with the provisions of the laws of the United States." Clause (a) of said Act provides for an appeal from the District Court to the Circuit Court of Appeals. That means the appeal to the Supreme Court should be taken like an appeal is taken from the District Court to the Circuit Court of Appeals. Everyone knows that is done by filing the transcript in the Court of Appeals and giving notice to the opposing party, filing an assignment of error, or statement of points, brief, etc.

The whole Act shows beyond all doubt that that was the way Congress intended the appeal to the Supreme Court should be taken. Clause (b) strengthens that position when

it provides: "Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

If clause (c) of this Act does not provide for an appeal, as of right, what in the world is it? It is copied in said Chandler Act. If not for an appeal it should be blotted out of the statute book. Congress meant what it said. That from every judgment in bankruptcy proceedings an appeal lay to the Supreme Court. There was no mystery about the manner of the appeal—that is, how it should be taken.

The context in clause (a) and (b) conclusively shows that it should be taken like an appeal is taken from the District Court to the Circuit Court of Appeals. That is so plain "that he who runs may read." Just a simple appeal—that is all. Congress intended in using the word "appeal" to use it as that term has been used for centuries. It is thus defined: "The removal of a cause from a Court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial." Bouviers Law Dictionary, Vol. 1 p. 127. Paul when wrongly accused said; "I appeal unto Caesar."

13. What is this Bankruptcy Act? This Court defined the Act in Wright v. Union Central as follows:

> "This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt."

And it must be construed as follows:

> "Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property . . . There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor certainly

is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress." (P. 168-169.)

Wright v. Union Central, 311 U. S. 273.

14. The merits of the case is governed by equitable rules as follows: Brandenburgh on Bankruptcy, Fourth Edition, Sec. 10, p. 27:

> "As a Court of Equity, it will deal with the rights of the parties upon their merits, rather than be controlled by strict legal forms, and will seek to administer the law according to its spirit and not merely by its letter. It follows that within the limits prescribed by the Bankruptcy Acts and the special rules of practice prescribed by the Supreme Court, bankruptcy proceedings are to be administered in accord with the general principles and practices of equity, and this applies to the corrections of mistakes in judgment and other matters of record injurious to the rights of the parties." Many cases cited.

16. This is a new remedial Act and should be construed as follows:

> "There are three points to be considered in the construction of all remedial statutes; the old law, the mischief and the remedy; that is, how the common law stood at the making of the Act. What the mischief was, for which the common law did not provide; and what remedy the Parliament hath provided to cure this mischief. And it is the business of the Judges to so construe the Act as to suppress the mischief and advance the remedy." (Vol. 1—Introduction, Sec. 3 (Star Page 87) bottom page 53, Blackstone's Commentaries on the Laws of England.)

17. The action of the Court in denying the appeal means one of two things: (1) That the Chandler Act does not provide for an appeal, or (2) that if it does, the appeal was not properly taken. I am inclined to think it denied the appeal and refused to review the judgment and based the order on the claim that no appeal or review is provided for by said Chandler Act.

18. We shudder at the consequences of refusing to review this judgment! Suppose in some way in a later decision of the Courts, it was established, beyond all doubt, that Congress intended to provide for an appeal and unconditional review of the judgment below by virtue of Section 24 of the Chandler Act. The result of the action of this Court in refusing to follow the Act of Congress would deprive the Debtors of the benefits of this Act and deprive them of the right to save their home. (It would be final and no appeal could be taken. There would be no remedy.) What an awful injustice that would work. The only safe thing to do here is to review this challenged judgment and see whether the Debtors should lose their home.

19. It has been urged that a Court has a right to decide wrong as well as right. We deny that proposition. It must be right or it is void. The violation of a statute creates an incurable situation. "A question is not settled until settled right."

20. The body of this Chandler Act and the context show beyond all doubt that this appeal is from "proceeding in bankruptcy." Hence, it comes within the Act and it is the unquestioned duty of the Court to carry out the will of Congress by reviewing the judgment of the Court of Appeals. Every question and issue in the case is properly presented as solely a question of law. The sole duty of this Court as commanded by the Supreme Law of the Land is to review

the judgment below. That means the review is imperative. That does not mean that the Court can run over the questions presented and anticipate the decision it would make on the merits of the case. Congress did not mean such a foolish thing as that. It meant it must review the decision below regardless of what that decision would be. For example: Suppose a Court is about to hear the evidence and argument and decide a case in nisi prius Court. The Judge could not look over the papers and refuse to hear the case and pick up his pen and dismiss it. That would not be a trial. Neither would the refusal of the Court here to consider the case be a review of the judgment here.

21. A review means "To re-examine judicially, as a higher Court may review the proceedings and judgment of a lower one"; . . . "Judicial examination, as of the proceedings of a lower Court by a higher."—*Webster.*

To deny the petition to review a judgment is not reviewing that judgment at all. To review the judgment means the higher Court must re-examine every part of the judgment below and every legal question presented or raised and if they do not coincide with sound law, to so find and change or set aside the judgment and order a new one entered to conform to the law.

To deny the petition as was done here was a judgment but was not a review judgment as was intended by Congress in the Chandler Act. Why contend further it is as plain as the "noon day sun" that this Court greatly erred in denying the petition to review the judgment and in refusing to re-examine it and in not reviewing it. This prohibited it from dismissing the petition. The order denying the petition is null and void and of no effect in law and should be set aside without delay.

(2) The second possible ground is that Congress did

provide for an appeal and a review but the appeal was not properly taken.

1. There is nothing in the record to sustain that position. The record shows the Debtors filed a petition for an appeal, as of right, to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered December 2, 1942, to the Supreme Court of the United States. The merits of the case are set out in a 22 page petition. The Debtors also filed a 17 page assignment of errors of the Court of Appeals. Then it filed a 28 page supporting brief. In each of these papers the Debtors set out Section 24 (c) of the Chandler Act as follows:

> 1. (c) "The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

2. We again call attention to the fact that clause (a) of said Section 24 must be read with (b) and (c) as follows:

> "SEC. 24. JURISDICTION OF APPELLATE COURTS.—a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to re-

view, affirm, revise, or reverse, both in matters of law and in matters of fact." Chandler, p. 17.

3. It is as plain as day that Congress was providing for an absolute appeal, as of right, in clause (a) from the District Court to the Circuit Courts of Appeals. It is provided: (b) "Such jurisdiction shall be exercised by appeal and in the form and manner of an appeal." That means no allowance of appeal by the Court was required but an absolute appeal without any action of the Court. If Congress had intended to make the appeal depend upon such an allowance, it would have said so and would not have used the language in clause (b).

4. Congress meant an appeal as defined by Bouvier: "The removal of a cause from a Court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and trial." That is as old as the law itself.

Every step has been taken and the appeal has been properly perfected. The papers and case are in the Supreme Court and nowhere else and Congress has specifically commanded the Court to review the judgment in question.

5. Though we do not fear the result of a review of the merits of the case presented by the appeal, yet, we do not concede that this Court can consider its merits to determine whether it will review the case. It is commanded by the Law of the Land to review which is a judicial re-examination of the legal questions presented in the judgment. There is no condition attached to the clause. The Court is absolutely ordered to re-examine the judgment regardless of the consequences or merits of the case. It has no discretion in the matter.

6. On the theory that the Court must review the judgment we will say a word about the merits. It is shown in

the Debtors second paragraph or petition for an appeal as of right, the assignment of errors and the supporting brief, and not denied that the Supervising Commissioner fixed the value of the land at $6,000 and fixed the time to redeem in one year from May 27, 1941 (or July 10, 1941 when the Court confirmed his report) that the Respondent at once, appealed from said judgment to the Circuit Court of Appeals. That it filed all of the papers required to perfect said appeal and also a supporting brief and contended therein that said $6,000 was too low, (That it should have been about $8,000) and said time to redeem was too long. (They believe it orally argued said appeal in said Court.) That said appeal was affirmed in said Court of Appeals over one year from July 10, 1941, namely, October 9, 1942.

7. The decision of this Court in the Bronson case (17 L. Ed. 616) held that the action of the Creditor in so appealing suspended the execution of said judgment by said Creditor and prevented it from enforcing it against the Debtors and operated as a supersedeas. It was dormant until the Creditors appeal was terminated on October 9, 1942. This Court said:

> "They (the parties) having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it pending the appeal. They assert that the decree is founded in error and for that reason should not be executed, but should be reversed and corrected in the Appellate tribunal. The Appeal suspends the execution of the decree. (Bronson v. LaCross, 1 Wall. 405, 17 L. Ed. U S. 616)."

The case has never been overruled but Rose's Notes show it has been approved by a number of subsequent decisions. The position of the Creditor is absurd—that it could attack

the judgment and seek to overthrow it and at the same time have it run against the Debtors. If the Creditor could not take any steps to enforce it while it was appealing, it follows it could not enforce it as against the Debtors. If it could not enforce it, it was dormant and the time to redeem could not run against them. The Court of Appeals in its judgment paid no attention to this great decision of this Court which stands, like a stone wall, in its way to take this land from the Debtors.

8. Then there is another error in said judgment in this: The Supreme Court in Wright v. Union Central (December 9, 1940—311 U. S. 273) held that the Creditor could only collect the appraised value of the land—and not a penny more. $6,000 here and that was paid into Court in time and is now in the Registry of said Court and the Court of Appeals should have followed the Bronson case and the other authorities cited and ordered said Creditor to accept said redemption money. No, like Micawber, its plate is up all of the time. The evidence showed and was not disputed that the Creditor had kept $450 out when the loan was made and that the Debtors never did receive it and yet the District Court entered judgment against the Debtors for this sum and the Court of Appeals paid no attention to that but approved it. (The Debtors are informed that since said decision said Creditor has advertised that it would pay the money it kept out in other like cases and that it is now paying said money or stock back to other Debtors.) This error of the Court in approving said order of the lower Court is enough to reverse said judgment below.

9. This is not all. As set out in said petition for a review, the assignment of errors and supporting brief, all of the authorities starting with said Wright appeal (311 U. S. 273) all hold that all said Creditor can collect is the appraised value fixed by said Court at a hearing of the testimony of

witnesses, which was $6,000, and no more. That it cannot collect said rent in addition to said appraisal. The Creditor questioned that amount by its appeal as set out but the Court of Appeals affirmed said judgment and that was the end of that question and it is conclusively bound thereby. The present attack is a collateral attack on it and must fail for that reason.

In spite of the law the Creditor claimed the right to recover rent in the hands of the Trustee in said cause in the sum of $843 and said District Court erroneously allowed that and the Court of Appeals approved that. On the question that that was error we cited—In re Ezell, 45 Fed. Supplement 164. This alone should reverse said judgment.

10. The lawyer is an officer of the Courts. He has no choice but must state the law as he thinks it is. If he shrinks and does not do that he is neglecting his duty to the citizen he happens to represent, and in this case to the Supreme Court of the United States.

11. In conclusion: Permit us to state: That Counsel firmly believes this Court in refusing to obey the command of Congress has committed gross error in this: Where did the Supreme Court get the power to refuse to review this judgment? What is the source of its power. This Court stated In re Graham, 10 Wall. 541 (19 L. Ed. 981) the following:

(a) "Our jurisdiction is specific and limited. It is defined by the Constitution and laws of the United States. We can exercise none but what is conferred by one or the other." (10 Wall. 541.)

(b) The author of the Digest of the Reports of the Supreme Court of the United States puts it in this language:

"The United States Supreme Court can exercise no

jurisdiction, except what is conferred by the Constitution and laws of the United States." (10 Wall. 541.)

(c) The Supreme Court held in Cohens v. Virginia, 6 Wheat. 264, in the words of the author of the Reports as follows:

"The United States Supreme Court has no more right to decline the execution of jurisdiction which is given, than to usurp that which is not given."

(d) Chief Justice Marshall in Fisher v. Cockerell, 5 Peters 248, stated on this point as follows:

"As this Court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon it." (5 Peters 248.)

Thus it derives all of its power from the Constitution and the laws of Congress.

12. Tell us where there is any laws of the United States which authorized this Court to decline to review this judgment as commanded by the Congress in Section 24 of the Chandler Bankruptcy Act of June 22, 1938. Congress never gave this Court the power to defeat this Act by refusing to review this judgment and never will. To contend it gave this Court the power to defeat this Act is absurd and unreasonable. Neither has the Constitution given it such a power. It has some inherent powers but it will not be claimed that it could use that inherent power to defeat an Act of Congress providing for the review of this judgment. No, never. That would be a monstrous proposition. This right of review must stand and be enforced by this Court. If the Constitution or the laws of the United States did not give it such a power it follows that it never had such a power at all. Where would it get such a power? If it had

no such power, the order of this Court of May 1, 1944 refusing to review this judgment, is absolutely null and void and does not bind the Debtors. The language of the order, "The application for appeal is also denied," is confusing and void for the reason this Court is not required to allow the appeal. That is allowed by the Act of Congress of June 22, 1938. There is no power on Earth that can defeat said appeal and review. The failure of the Court to mention anything about the review of the judgment, does not change the situation. The Court should have mentioned it. It is in the Act and the Act is a part of the order in question. The failure of the Court to mention it will be taken as a decision against the Debtors and as a refusal to review the judgment.

That ends this story. The order of May 1, 1944, that the appeal was denied means nothing. It does not come within a mile of defeating the appeal, provided for by the Supreme Law of the Land. That stands like a stone wall and the Court might decline to grant it every day but that would not affect it at all. The appeal, as of right, will go on, no difference what this Court may think of it, until Congress repeals said Section 24 of the Chandler Bankruptcy Act. The failure of the Court to mention what it would do about reviewing the judgment amounted to a refusal to review the judgment. The Court should set aside the order as to the appeal as void, and indicate that it would follow the Act of Congress and review the judgment below.

Enough has been said. We hope we have aided the Court.

Respectfully submitted,

RUFUS MESHBERGER,
LELIA B. MESHBERGER,
Debtors.

May 18, 1944.

STATE OF INDIANA }
COUNTY OF JAY } ss:

Rufus Meshberger being duly sworn on his oath says, he is one of the Debtors in the above cause and is familiar with the same. That the facts set out therein are true, as he is informed and verily believes.

RUFUS MESHBERGER,
By Said Rufus Meshberger.

Subscribed and sworn to before me this 18th day of May, 1944.

SAMUEL E. COOK,
Notary Public.

My Commission Expires April 7, 1947.

STATE OF INDIANA }
COUNTY OF HUNTINGTON } ss:

Samuel E. Cook, Counsel for Debtors in the above cause does hereby certify that in his opinion the above petition for a rehearing in said cause is well founded and is presented in good faith and not for delay.
May 18, 1944.

SAMUEL E. COOK,
Counsel.

SAMUEL E. COOK,
Huntington, Indiana,
ELMER MCCLAIN,
Lima, Ohio,
Counsel for Petitioners.